Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

TAL TECHNOLOGIES, INC.,

Petitioner,

v.

THE CITY OF OKLAHOMA CITY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Oklahoma

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Date, Counsel name, address & telephone number **137**

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

I. RULE 14 1(h)(i)(i): Opinion and order entered in conjunction with the judgment sought to be reviewed:

1. Oklahoma Supreme Court Order - Denying Petition for Certiorari. *The City of Oklahoma City v. Tal Technologies, Inc. et al.*, Case Number 94,045. Decided 11/6/00.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, November 6, 2000

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

* * *

94,045 The City of Oklahoma City v. Tal Technologies, Inc. et al.

Petition for certiorari is denied.

CONCUR: Hargrave, C.J., Watt. V.C.J., Hodges, Lavender, Kauger, Summers, Winchester, JJ.

DISSENT: Boudreau, JJ.

Opala, J., dissenting.

I would grant certiorari to offer a precedential pronouncement on the tendered issues.

* * *

/S/ Chief Justice

CHIEF JUSTICE

2. Unpublished Opinion of the Oklahoma court of Civil Appeals, *The City of Oklahoma City v. Tal Technologies, Inc. et al.*, Case Number 94,045. Trial Court's Ruling (denying Petitioner's motion to Reconsider) Affirmed - decided July 31, 2000.

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA
DIVISION II

THE CITY OF OKLAHOMA CITY, a municipal corporation, Plaintiff/Appellee, vs. TAL TECHNOLOGIES, INC., an Oklahoma corporation, Defendant/Appellant, and BANK ONE, OKLAHOMA CITY; FORREST "BUTCH" FREEMAN, as Treasurer of Oklahoma County, Oklahoma; SHIRLEY DARRELL, EARL ROOMS, and STUART EARNEST, SR., as Board of County Commissioners of Oklahoma County, Oklahoma; L.D. RHODES OIL CO., an Oklahoma corporation; and L.D.	FILED JUL 31 2001 JAMES W. PATTERSON CLERK **Case No. 94,045**

RHODES, an individual,)
)
Defendants.)

APPEAL FROM THE DISTRICT COURT OF

OKLAHOMA COUNTY, OKLAHOMA

HONORABLE NILES JACKSON, TRIAL JUDGE

AFFIRMED

William 0. West
MUNICIPAL COUNSELOR
Jerry R. Fent
ASSISTANT MUNICIPAL COUNSELOR
Oklahoma City, Oklahoma For Appellee

Ronald A. Schaulat
Michael H. Brady
BRADY, SCHAULAT & FALSETTI
Oklahoma City, Oklahoma For Appellant

OPINION BY JOHN F. REIF, VICE CHIEF JUDGE:

This appeal arises from a condemnation proceeding brought by the City of Oklahoma City to acquire two parcels of land owned by Tal Technologies, Inc. The subject of this appeal is two orders by the trial court that denied two motions to reconsider filed by Tal Technologies. The first motion to reconsider, filed September 28, 1999, asked the trial court to set aside an order filed August 28, 1997, as modified on October 2, 1997. These 1997 orders denied Tal Technologies relief on its objection to the public necessity for taking its land. The second motion to reconsider filed November 2, 1999, basically alleged that the trial court erred in denying the first

motion to reconsider. The City of Oklahoma City has moved to dismiss this appeal, generally contending that the order of August 28, 1997, as modified October 2, 1997, was a final order that was not timely appealed. The supreme court deferred review of the motion to dismiss this appeal to the decisional stage.

The City of Oklahoma City has contended that the order of August 28, 1997, as modified by the order of October 2, 1997, finally adjudicated the issue of the public necessity of the taking. This issue had been raised by Tal Technologies in its Answer and Exceptions to the Report of the Commissioners. Tal Technologies contested the public necessity of the taking essentially on two grounds: (1) Tal Technologies had "already dedicated the property to public parking" and (2) a change of use from public parking to a non-parking, commercial development of the property. The City of Oklahoma City has stressed that the "motions to reconsider" were filed almost two years after the orders that decided the issue of necessity adversely to Tal Technologies. The City argues that these motions to reconsider are untimely to preserve appellate review of the issue of the necessity of the taking.

Tal Technologies has acknowledged that the order of August 28, 1997, as modified October 2, 1997, may have been an appealable interlocutory order. However, Tal Technologies contends that the right to appeal did not require Tal Technologies to actually bring an appeal in order to ultimately receive appellate review of the issue of the necessity of the taking.

The position taken by Tal Technologies poses conceptual difficulty. If the order of August 28, 1997, as modified October 2, 1997, is indeed "interlocutory," appellate review of that adjudication must await a final disposition of all the issues in the case. The fact that a trial court may persist in an "erroneous" interlocutory ruling does not give the "aggrieved

party" the right to appeal the refusal to reconsider such an interlocutory order, once the permissible time to appeal the interlocutory order has passed. If we were to accept the position of Tal Technologies, we would be required to dismiss this appeal as premature, i.e., one that impermissibly precedes the final disposition of all the issues.

However, we do not agree with the position of Tal Technologies. In *McMillan v. Holcomb,* 1995 OK 117, ¶ 3, 907 P.2d 1034, 1035-36 (citation omitted) (footnotes omitted) (emphasis added), the supreme court held that "an order adjudicating a right to condemn is appealable . .. as a final order [that shall have] commenced the appellate clock," if the requisite memorialization of the judgment is filed. Even the concurring opinion of Justice Opala in *McMillan* recognizes that "the filing of a *recordable memorial* [deciding the issue of necessity] begins the 12 0.S. Supp. 1993 § 990A *thirty-day count down for commencing an appeal." Id.* at ¶ 11, 907 P.2d 1042 (footnote omitted). In the instant case, the order of the trial court filed August 28, 1997, as modified by the order of October 2,1997, were sufficient recordable memorials of the adjudication of the City's right to condemn, and these orders commenced the appellate clock for the thirty-day count down for commencing an appeal from the final adjudication of the issue.

As an unappealed, final order, the order of August 2, 1997, as modified October 2, 1997, cannot be reviewed by this court after an unsuccessful reexamination by the trial court. *Yery v. Yery,* 1981 OK 46, ¶ 14, 629 P.2d 357, 363. However, that does not *ipso facto* entitle the City to dismissal of this appeal. Tal Technologies has timely commenced an appeal for review of the correctness of the trial court's rulings on its "motions to reconsider."

Statutes and court rules governing practice and procedure do not provide for a party to challenge a trial court ruling by a

"motion to reconsider." However, the supreme court has treated "motions to reconsider" as the functional equivalent of motions for new trial or motions to vacate depending upon when the motion to reconsider is filed in relation to the judgment they seek to challenge. A motion to reconsider filed within ten days of the filing of the judgment will be treated as a motion for new trial. A motion to reconsider filed more than ten days, but within thirty days, from the filing of the judgment will be treated as a term-time motion to vacate under 12 0.S. Supp. 2000 1031.1. A motion to reconsider filed more than thirty days after the filing of the judgment may be treated as the requisite pleading (motion or petition, as the case may be) to invoke the statutory power of the court to vacate a judgment under 12 0.S. Supp. 2000 § 1031.

Technically, to proceed under § 1031, Tal Technologies was required to file a "petition, verified by affidavit, setting forth the judgment, decree, or appealable order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant." 12 O.S. Supp. 2000 § 1033. In addition, summons should have issued as well. However, the fact that Tal Technologies did not literally comply with these requirements should not affect its right to appeal the denial of its motion. We so rule, because the first motion to reconsider (1) stated a ground cognizable under § 1031, (2) set forth a "defense" to the taking, and (3)the City appeared and responded without raising any objection to the manner in which Tal Technologies was proceeding to obtain the trial court's re-examination of its prior orders.

The separately numbered points four and five in the first motion to reconsider sufficiently allege 'fraud, practiced by the successful party, in obtaining a judgment or order" under § 103 1(4). These separately numbered points read:

> 4. The City deceived and defrauded this Court by claims of MAPS usage for property where the parcels

were never included in MAPS and are not now included for MAPS, but for private for-profit development which dramatically differs from The City's alleged intended use.

5. [The] parcels were never properly included in MAPS plan and so were never subject to eminent domain taking.

The chief problem with this allegation of "fraud" is that Tal Technologies has not shown how it was prevented by the City from discovering this fact prior to judgment. In addition, the burden was on Tal Technologies to use diligence to ascertain the necessity and purpose of the taking prior to judgment on the issue of public necessity. "[I]n a proceeding under § 1031 to vacate an earlier judgment on the grounds of fraud, *the petitioner must* (1) show that he (or she) acted without delay in asserting his (or her) rights after discovering the fraud, (2) establish that he (or she) used diligence in the original action in trying to discover and expose the fraud, (3) provide clear and convincing evidence of the fraud, and (4) demonstrate that there is a substantial likelihood that a new trial will have a different result." *Patel v. OMH Medical Center, Inc.,* 1999 OK 33, ¶ 38, 987 P.2d 1185, 1200 (emphasis added).

We observe that the MAPS project was a matter of public record well before this condemnation proceeding began and at the time Tal Technologies filed its answer and exceptions to the report of the Commissioners. Indeed, the president of Tal Technologies, Moshe Tal, was intimately familiar with the MAPS project.[1] Despite the extensive knowledge and

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[1] We note the following from *Oklahoma City v. Urban Renewal Authority,* 1999 OK 71, ¶ 10, 988 P.2d 901, *905:*

> One of the MAPS program's primary purposes is to attract private investors to invest in the

involvement that its president had with the MAPS project, Tal Technologies failed to allege that the parcels were not included in the MAPS project as defined and delineated by the public record. Not only does lack of diligence on the part of Tal Technologies prevent reconsideration of the property's inclusion in the MAPS project, Tal Technologies also waived such a challenge by failing to plead it.

The City's petition sought to appropriate the parcels for "public MAPS facilities" including "public park, parking, recreational and MAPS facilities." The taking was not limited to a parking need. The court's judgment expressly determined:

> That the Plaintiffs public purposes as shown in its "Resolution of Necessity" and City Ordinance No. 52-23 for "MAPS Infrastructure/Parking and public MAPS facilities, park, parking and recreational purposes" are authorized by law pursuant to Article 2, Section 24,

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areas being developed as part of the program. To this end, Oklahoma City's City Council passed a Redevelopment Plan for the Bricktown area in 1997. The Redevelopment Plan was designed to attract private investors to build sports related parking and entertainment related improvements. Appellant Moshe Tal was the leader of one group of investors who sought the contracts to carry out the Redevelopment Plan but the City Council, after widely publicized hearings and based on an extremely close vote, ultimately awarded the Development Agreements to Bricktown Parking Investors and TMK/Hogan rather than to Tal's group. The final decision was made by the City Council only after two years of public meetings, public notices, public hearings, and citizen review.

Oklahoma Constitution; 27 O.S. 1991 § 5; 11 O.S. 1991 § 22-104; 11 O.S. 1991 § 32-101 to 32-103; 11 O.S. 1991 § 33-101 and 33-103; and 11 O.S. 1991 § 36-401.

In a few words, the City had a valid public purpose for acquiring the lots and had discretion to devote the lots to any of several purposes within the MAPS project, including redevelopment.

"One pressing for a judgment's (or order's) vacation clearly bears the burden of bringing the case within the parameters of § 103 1 relief."*FDIC v. Jernigan, 1995* OK 54, ¶ 8,901 P.2d 793, 796 (footnote omitted). "It is the movant for vacation who must overcome the law's presumption of regularity that attaches to a judgment (or order) and to the judicial proceedings that precede it." *Id.* An appellate court reviews a trial court's ruling on a motion to vacate for fraud *"by probing whether sound discretion was exercised upon sufficient cause shown." Id.* Where the movant for vacation "has failed to bring for review a record that would overcome the presumption of... correctness," an appellate court cannot order or sustain vacation of the challenged judgment or order. *Id.* at ¶ 21, 901 P.2d at 799. It is not an abuse of discretion to deny a motion to vacate where a sufficient ground has not been shown. *See Park v. Continental Oil Co.,* 1939 OK 46,87 P.2d 324.

The record before us does not show sufficient grounds for vacation of the challenged orders and, therefore, we hold the trial court did not err or abuse its discretion in denying the motions to reconsider/motions to vacate pressed by Tal Technologies. The denial of those motions is AFFIRMED.

GOODMAN, P.J., and COLBERT, J., concur.

July 31, 2001

3. *Journal Entry of Judgment Denying Defendant Tal Technologies, Inc. Its Motion To Reconsider*, District Court of Oklahoma County, Oklahoma, *Oklahoma City v. Tal technologies, Inc., et al*, Case No. CJ-97-2034-65 - filed December 6, 1999.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY a municipal corporation,	)	
Plaintiff,	)	
vs.	)	Case No. CJ-97-2034-65
TAL TECHNOLOGIES, INC., an Oklahoma corporation, et al.,	)	
Defendants.	)	

JOURNAL ENTRY OF JUDGMENT DENYING DEFENDANT TAL TECHNOLOGIES, INC. ITS MOTION TO RECONSIDER

On September 28, 1999, the defendant, Tal Technologies, Inc. ("Tal Tech") filed its motion to reconsider and modify Orders of August 29, 1997, and October 2, 1997, granting plaintiff possession of and title, and right of entry to the property in question of this eminent domain proceeding.

Thereafter, the plaintiff ("City") filed a response and this defendant a reply to the issues.

On October 21, 1999, a hearing was held on the defendants' motion to reconsider with the defendant Tal Tech being represented by and though its attorneys Michael H.

Brady and Ronald A. Schaulat of BRADY, SHAULAT & FALSETTI. The plaintiff ("City") being represented by and though its attorneys William 0. West, Municipal Counselor and Jerry R. Fent, Assistant Municipal Counselor.

The court after reading the pleadings filed in the case and hearing arguments of counsel finds that said defendant Tal Tech's motion to reconsider, filed on September 28, 1999, should be denied.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendant Tal Technologies, Inc. motion to reconsider, filed on September 28, 1999, is hereby DENIED.

ORDERED this 6th day of December, 1999.

/s/ Niles Jackson
Niles Jackson, District Judge

APPROVED AS TO FORM:

/s/ Michael H. Brady
Michael H. Brady, OBA # 1053
Ronald A. Schaulat, OBA # 10463
BRADY, SCHAULAT & FALSETTI
P.O. Box 718; 719 North Shartel
Oklahoma City, OK 73101
Attorneys for Defendant, Tal Technologies, Inc.

William O. West
Municipal Counsel

By: /s/ Jerry R. Fent
Jerry R. Fent, OBA # 2868
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The City of Oklahoma City
200 North Walker, Suite 400

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(405)297-2696 94 297-2451
Attorneys for the Plaintiff
The City of Oklahoma City

[Certificate of Service omitted]

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4. Order Granting Modification of Order Overruling Exceptions to Report of Commissioners, *The City of Oklahoma City vs. Tal Technologies, Inc., et al.,* District Court of Oklahoma County, Oklahoma - Case No. CJ-97-2034-65 - filed 10/17/97.

IN THE DISTRICT COURT OF OKLAHOMA
STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY, a municipal corporation,	)	
Plaintiff,	)	
vs.	)	*Case* No. **CJ-97-2034-65**
TAL TECHNOLOGIES, INC., an Oklahoma corporation, and BANK ONE, OKLAHOMA CITY, and FORREST "BUTCH" FREEMAN, as Treasurer of Oklahoma County, Oklahoma, and SHIRLEY DARRELL, EARL ROOMS and STUART EARNEST, SR., as Board of County Commissioners, Oklahoma County, Oklahoma,	)	

and L.D. RHODES OIL CO., an)
Oklahoma corporation, and)
L.D. RHODES, an individual,)
)
Defendants.)

ORDER GRANTING MODIFICATION OF ORDER OVERRULING DEFENDANT'S EXCEPTIONS TO THE REPORT OF COMMISSIONERS PURSUANT TO 12 OKLA. STAT. SUPP. 1994 § 1031.1 GRANTING CITY OF OKLAHOMA CITY POSSESSION, TITLE AND RIGHT OF ENTRY

NOW on this 2nd day of October, 1997, this matter comes on for hearing on the Motion of the Plaintiff, The City, to Vacate or Modify Order Overruling Defendant's Exceptions to the Report of Commissioners, entered on the 28th day of August, 1997, and filed and recorded with the Registrar of Deeds, Book 7141, Pages 842-849, pursuant to 12 Okla. Stat. Supp. 1994 § 1031.1. After hearing argument of counsel for the Plaintiff, The City of Oklahoma City, and for the Defendant, Tal Technologies, Inc., reviewing the pleadings, and briefs and Defendant's (Tal Technologies, Inc.) Response to Plaintiff's Motion for Rehearing, Etc. and otherwise being fully advised, the Court finds Plaintiff's Motion should be sustained and the Order of August 28, 1997, should be modified by the striking of findings set forth in Paragraph 10, and by the striking of the Second Paragraph of Page 5 of said Order.

In conformance with this Order the recitations in the Modified Order shall reflect these amendments.

IT IS ORDERED, ADJUDGED AND DECREED that the Motion of Plaintiff to Modify said Order of August 28, 1997, pursuant to 12 Okla. Stat. Supp. 1994 § 1031.1, is hereby sustained, and that said Order Overruling Defendant's Exceptions to the Report of Commissioners and Granting The

City of Oklahoma City Possession, Title and Right of Entry should be modified as provided herein. The Modified Order to be filed is attached a Exhibit 1.

DATED this 17th day of October, 1997.

/s/s Niles Jackson
DISTRICT JUDGE

[Filed 10/17/97 - Parties signatures, Certificate of Service and Exhibits Omitted]

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5. Modified Order Overruling Defendant's Exceptions to the Report of Commissioners and Granting the City of Oklahoma City Possession, title and Right of Entry, *The City of Oklahoma City vs. Tal Technologies, Inc., et al.,* District Court of Oklahoma County, Oklahoma - Case No. CJ-97-2034-65 - filed 10/17/97.

IN THE DISTRICT COURT OF OKLAHOMA
STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY, a municipal corporation,	)	
Plaintiff,	)	
vs.	)	*Case* No. **CJ-97-2034-65**
TAL TECHNOLOGIES, INC., an Oklahoma corporation, and BANK ONE, OKLAHOMA CITY, and FORREST "BUTCH" FREEMAN, as Treasurer of	)	

Oklahoma County, Oklahoma,)
and SHIRLEY DARRELL,)
EARL ROOMS and STUART)
EARNEST, SR., as Board of)
County Commissioners,)
Oklahoma County, Oklahoma,)
and L.D. RHODES OIL CO., an)
Oklahoma corporation, and)
L.D. RHODES, an individual,)
)
Defendants.)

MODIFIED ORDER OVERRULING DEFENDANT'S EXCEPTIONS TO THE REPORT OF COMMISSIONERS AND GRANTING THE CITY OF OKLAHOMA CITY POSSESSION. TITLE AND RIGHT OF ENTRY

NOW on this 28th day of August, 1997, the Plaintiff's Motion comes on for hearing for an Order overruling Defendant's exceptions and confirming the "Report of Commissioners" and granting Plaintiff's possession, title and right of entry, insofar as to the MAPS Tract Nos. 8016 and 8019 (See Exhibit "A") in this eminent domain proceeding.

The Plaintiff City of Oklahoma City, a municipal corporation ("City"), is represented by its attorneys, William 0. West, Municipal Counselor, and Jerry R. Fent, Assistant Municipal Counselor. The Defendant TAL Technologies, Inc. appearing by and through its attorney Jay D. Adkisson. The Defendant BANK ONE having filed a Disclaimer in this case. The Defendant, L.D. RHODES OIL CO. and L.D. RHODES, an individual, appearing by and through attorneys Allen Campbell of KIRK & CHANEY. The County Treasurer and County Commissioners appearing by and through their attorney, Gretchen Crawford, Assistant District Attorney.

After a review of the City's motion, Defendant's exceptions, Court file, the appearance docket, and hearing arguments, the Court FINDS:

1. That on June 12, 1997, the "Report of Commissioners" was duly executed and filed in this case, and recorded with the Oklahoma County Clerk's office in Book 7094, Page 581 on the same date.

2. That on July 11, 1997, the City deposited the award plus fees and costs for this case into the Court Clerk's office.

3. That on June 30, 1997, the Defendant, TAL Technologies, Inc. filed exceptions to the "Report of Commissioners."

4. That City and TAL Technologies, Inc. have all filed a "Demand for Jury Trial" for a jury to hear the issue of the amount of just compensation for the taking of this property.

5. That TAL Technologies, Inc.'s main exceptions argument are: (a) the property is already dedicated for "public parking" and (b) already transferred to Oklahoma City Urban Renewal Authority ("OCURA").

6. That the Plaintiff's public purposes as shown in its "Resolution of Necessity" and City Ordinance No. 52—23 for "MAPS Infrastructure/Parking and public MAPS facilities, park, parking and recreational purposes" are authorized by law pursuant to Article 2, Section 24, Oklahoma Constitution; 27 O.S. 1991 § 5; 11 O.S. 1991 § 22—104; 11 O.S. 1991 § 32—101 to 32—103; 11 0.5. 1991 § 33—101 and 33—103; and 11 O.S. 1991 § 36—401.

7. That said Defendants' exceptions should be overruled.

8. That the "Report of Commissioners" should be confirmed.

9. That MAPS Tract Nos. 8016 and 8019 as shown by Exhibit "A" and described in the "Report of Commissioners" is to be conveyed and transferred by operation of law to the Plaintiff.

10. The Plaintiff is to be granted possession, title and right of entry to the property as shown by Exhibit "A" and described as MAPS Tract Nos. 8016 and 8019 in the "Report of Commissioners.

11. That any pending demand for jury trial questioning the amount of the "Report of Commissioners" as to MAPS Tract Nos. 8016 and 8019 does not prohibit possession and title being vested into the Plaintiff (City) at this time.

12. That the "date of taking" in this case is the date the City deposited the award into Court, being: July 11, 1997.

IT IS ORDERED, ADJUDGED AND DECREED that the Defendants' exceptions are hereby overruled. The "Report of Commissioners" is hereby confirmed and as is filed in Book 7094, Page 531 of the County Clerk's office. The City is hereby granted all right, title, interest, possession and entry to the real property described in the attached Exhibit "A."

Dated this 17th day of October, 1997.

/s/s Niles Jackson
DISTRICT JUDGE

[Filed 10/17/97 - Parties signatures, Certificate of Service and Exhibits Omitted]

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6. Order overruling TTI's Exception to Commissioners' Report, *City of Oklahoma City vs. Tal Technologies, Inc., et al.*, District Court of Oklahoma County, Oklahoma - Case No. CJ-97-2034-65 - filed 8/28/97.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY, a municipal corporation,	)	
Plaintiff,	)	
vs.	)	*Case* No. **CJ-97-2034-65**
TAL TECHNOLOGIES, INC., an Oklahoma corporation, and BANK ONE, OKLAHOMA CITY, and FORREST "BUTCH" FREEMAN, as Treasurer of Oklahoma County, Oklahoma, and SHIRLEY DARRELL, EARL ROOMS and STUART EARNEST, SR., as Board of County Commissioners, Oklahoma County, Oklahoma, and L.D. RHODES OIL CO., an Oklahoma corporation, and L.D. RHODES, an individual,	)	
Defendants.	)	

ORDER OVERRULING DEFENDANT'S EXCEPTIONS AND CONFIRMING REPORT OF COMMISSIONERS AND GRANTING CITY OF OKLAHOMA CITY POSSESSION TITLE *AND* RIGHT OF ENTRY

NOW, on this 28th day of August, 1997, the Plaintiff's Motion comes on for hearing for an Order overruling

defendant's exceptions and confirming "the Report of Commissioners" and granting plaintiff's possession, title and right of entry, insofar as to the MAPS Tract Nos. 8016 and 8019 (See Exhibit "A") in this eminent domain proceeding.

The plaintiff, City of Oklahoma City, a municipal corporation ("City") is represented by its attorneys, William 0. West, Municipal Counselor and Jerry R. Pent, Assistant Municipal Counselor. The defendant TAL Technologies, Inc. appearing by and through its attorney Jay D. Adkisson. The defendant, BANK ONE having filed a Disclaimer in this case. The defendant, L.D. RHODES OIL CO. and L.D. RHODES, an individual, appearing by and through their attorneys Allen Campbell of KIRK & CHANEY. The County Treasurer and County Commissioners appearing by and through their attorney, Gretchen Crawford, Assistant District Attorney

After a review of the City's motion, defendant's exceptions, Court file, the appearance docket, and hearing arguments, the Court

FINDS:

1. That on June 12, 1997, the "Report of Commissioners" was duly executed and filed in this case, and recorded with the Oklahoma County Clerk's office in Book 7094, Page 581 on the same date.

2. That on July 11, 1997, the City deposited the award plus fees and costs for this case into the Court Clerk's office.

3. That on June 30, 1997, the defendant, TAL Technologies, Inc. filed exceptions to the "Report of Commissioners."

4. That City and TAL Technologies, Inc. have all filed a "Demand for Jury Trial" for a jury to hear the issue of the amount of just compensation for the taking of this property.

5. That TAL Technologies, Inc.'s main exceptions argument are: (a) the property is already dedicated for "public parking" and (b) already transferred to Oklahoma City Urban Renewal Authority ("OCURA").

6. That the Plaintiff's public purposes as shown in its "Resolution of Necessity" and City Ordinance No. 52-23 for "MAPS Infrastructure/Parking and public MAPS facilities, park, parking and recreational purposes" are authorized by law pursuant to Article 2, Section 24, Oklahoma Constitution; 27 *O.S.* 1991 § 5; 11 O.S. 1991 § 22-104; 11 O.S. 1991 § 32-101 to 32-103; 11 0.3. 1991 § 33-101 and 33-103; and 11 O.S. 1991 § 36-401.

7. That said defendants' exceptions should be overruled.

8. That the "Report of Commissioners" should be confirmed.

9. That MAPS Tract Nos. 8016 and 8019 as shown by Exhibit "A" and described in the "Report of Commissioners" is to be conveyed and transferred by operation of law to the plaintiff.

10. That the City when condemning a fee simple title by eminent domain cannot thereafter convey a fee simple title to a third party private or governmental entity, but may thereafter lease or rent said land to a third party, private or governmental entity for a like or similar public purpose pursuant to *Sublett v. City of Tulsa,* 405 P.2d 185 (Okl. 1965); *Oklahoma City v. Shadid,* 430 P.2d 190 (Okl. 1967) and the other authorities set out in the above paragraph number 7.

11. The plaintiff is to be granted possession, title and right of entry to the property as shown by Exhibit "A" and described as MAPS Tract Nos. 8016 and 8019 in the

"Report of Commissioners.

12. That any pending demand for jury trial questioning the amount of the "Report of Commissioners" as to MAPS Tract Nos. 8016 and 8019 does not prohibit possession and title being vested into the plaintiff (City) at this time.

13. That the "date of taking" in this case is the date the City deposited the award into Court, being: July 11, 1997.

IT IS ORDERED, ADJUDGED AND DECREED that the defendants' exceptions are hereby overruled. The "Report of Commissioners" is hereby confirmed and as is filed in Book 7094. Page 531 of the County Clerk's office. The City is hereby granted all right, title, interest, possession and entry to the real property described in the attached Exhibit "A" with the hereinafter restriction.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the City when condemning a fee simple title by eminent domain cannot thereafter convey a fee simple title to a third party, private or governmental entity, but may thereafter lease or rent said land to a third party, private or governmental entity for like or similar public purpose, including the approval of public easements or public dedications across this land.

DATED this 28th day of August, 1997.

/s/ Niles Jackson
District Judge

[parties signatures, Certificate of mailing and Exhibit omitted]

II. RULE 14 1(h)(i)(iii): Order Denying Rehearing:

Order denying Petitioner's Petition for Rehearing , Court of Civil Appeals - state of Oklahoma, *The City of Oklahoma City v. Tal Technologies Inc., et al.,* case 94,045 - decided 8/31/01 - filed 9/4/01.

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA Filed Stamp
DIVISION II SEP 2 2001
JAMES W. PATERSON
CLERK

THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDER(S):

94,045 THE CITY OF OKLAHOMA CITY, a municipal corporation, Plaintiff/Appellee, vs. TAL TECHNOLOGIES, INC., an Oklahoma corporation, Defendant/Appellant, and BANK ONE, OKLAHOMA CITY, and F O R R E S T "BUTCH" FREEMAN, as Treasurer of Oklahoma County, Oklahoma, and SHIRLEY DARRELL, EARL ROOMS, and STUART EARNEST, SR., as Board of County Commissioners of Oklahoma County, Oklahoma, and L.D. RHODES OIL CO., an Oklahoma corporation, and L.D. RHODES, an individual, Defendants.

Petition for rehearing denied.

* * *

Done in conference this 31st day of August 2001.

/s/ Jerry L. Goodman
JERRY L. GOODMAN
Presiding Judge

III. RULE 14 1(h)(i)(vi): Other Material Essential to Understand the Petition:

1. Initial Petition (for condemnation) - *The City of Oklahoma City vs. Tal Technologies, Inc., et al.,* District Court of Oklahoma County, Oklahoma - Case No. CJ-97-2034-65 - filed March 25, 1997

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY, a municipal corporation,	)
Plaintiff,	)
vs.	) **No. CJ-97-2034-65**
TAL TECHNOLOGIES, INC., an Oklahoma corporation, and BANK ONE, OKLAHOMA CITY, and FORREST "BUTCH" FREEMAN, as Treasurer of Oklahoma County, Oklahoma, and SHIRLEY DARRELL, EARL ROOMS and STUART EARNEST, Sr., as Board of County Commissioners, Oklahoma County, Oklahoma, and L. D. RHODES OIL CO., an Oklahoma corporation, and L. D. RHODES, an individual,	)
Defendants.	)

PETITION TO SELECT AND SUMMONS

COMMISSIONERS

COMES NOW the Plaintiff, The City of Oklahoma City, a municipal corporation, hereinafter known as Petitioner, by virtue of the power vested in it by law, to appropriate by eminent domain a fee simple title (less and except oil and gas minerals) public MAPS facilities to the following described real property, to wit:

MAPS PARCEL NO. 8016 — Fee simple title to:

A part of the Northwest Quarter *(NWI4)* of Section Three (3), Township Eleven (11) North, Range Three (3) West of the Indian Meridian, Oklahoma County, Oklahoma, more particularly described as follows:

Beginning at the point of intersection of the South line of the Missouri-Kansas-Texas Railroad Company Station Grounds with the West right-of-way line of the St. Louis-San Francisco Railway Company; thence South 89°31'09" West along the south line of the M.K. & T. Station grounds said line also being the north line of Washington line produced east a distance of 143.59 feet to an iron pin in the east right-of-way of the M.K. & T. Railroad right-of-way, thence South 44°37'33" West a distance of 10.04 feet to a point of curvature of a curve to the left, whose central angle is 04°13'08" and whose radius is 982.64 feet and whose chord is 72.34 feet and bears South 42°31'02" West for a distance of 72.36 feet to an iron pin in the east line of the M.K.&T. Railroad right-of-way, thence North 89°31'09", East a distance of 186.37 feet to an iron pin on the west right-of-way line of a S.L.&S.F. railroad right-of-way; thence along a curve to the right, whose central angle is 05°57'22" and whose radius is 591.67 feet, and whose chord is 61.48 feet and bears North 12°20'43" East for a distance of 61.51 feet to the point of beginning containing 9,910.635 square feet and or 0.228 acres, more or less.

AND,

MAPS PARCEL NO. 8019 — Fee simple title to:

A parcel located in the Northwest Quarter (NW/4) of Section Three (3), Township Eleven (11) North, Range Three (3) West of the Indian Meridian, in Oklahoma County, Oklahoma, particularly described as follows:

Beginning at an iron pin at the west line of the St. L.&S.F. Railroad right-of-way, said point being 929.34 feet South 89°31'09" West and *392.58* feet South 00°28'31" East of the North ¼ corner of said Section 3, Township 11 North, Range 3 West, I.M., Oklahoma County, Oklahoma; thence South 89°31'09" West a distance of 186.37 feet to an iron pin in the southeast line of an M.K.&T. Railroad right-of-way, thence South 32°27'27" East a distance of 2.31 feet; thence South 48°52'50" East a distance of 12.50 feet to a point of curvature of a curve to the right; thence along said curve to the right, whose central angle is 10°59'41" and whose radius is 490.80 feet, and whose chord is 94.04 feet and bears South 46°37'01" West, for a distance of 94.18 feet, to a point of curvature of a curve to the left whose central angle is 02°26'53" and whose radius is 982.64 feet, and whose chord is 41.98 feet and bears South 33°40'30" West, for a distance of 41.99 feet; thence South 32°27'03" West a distance of 122.94 feet to a point on the north right-of-way line of Interstate 40; thence South 89°38'44" East along said right-of-way line a distance of 264.97 feet; thence North 00°21'16" East a distance of 65.04 feet; thence South 87o57'25" East a distance of 56.25 feet to a point on the west right-of-way line of a S.L.&S.F. Railroad right-of-way; thence North 02°02'35" East, along said right-of-way a distance of 69.34 feet to a point of curvature of a curve to the right, having a central angle of 08°12'28" and a radius of 591.67 feet, and a chord of 84.69 feet that bears North 06°08'49" East for a distance of 84.76 feet to the point of

beginning containing 50,295.193 square feet and or 1.155 acres more or less.

PLUS, all right, title and interest in and to all streets, alleys and other public or private ways adjacent thereto, before or after vacation thereof, if said interests exists. (LESS AND EXCEPT OIL AND GAS MINERALS)

and in support of its petition for the appointment of commissioners to assess the damages therefor to Defendants, hereinafter known as the Owners, alleges as follows:

THAT Petitioner has in good faith offered to purchase the above said property from the Owners thereof, but said Owners have refused to grant the fee simple title (less and except oil and gas minerals) to their property.

THAT Petitioner needs the said property for public park, parking, recreational and MAPS facilities, and purposes, as shown by the Resolution of its City Council, a true and correct copy of which is attached hereto, marked Exhibit A, and made a part hereof.

THAT the following named persons or entities are all of the parties who have or claim any interest in the Tracts under which their names appear, who are referred to hereinabove and hereinafter as the Owners, to-wit:

1. TAL TECHNOLOGIES, INC., an Oklahoma corporation, by a Warranty Deed filed in Book 6093, Page 360 on September 24, 1990, and a Warranty Deed filed in Book 6235, Page 995 on December 9, 1991, and a. Right-Of-Way Easement filed in Book 6093, Page 369 on September 24, 1990, all as shown by the Oklahoma County Clerk's records, and other claims of possession to the subject real property.

2. BANK ONE, OKLAHOMA CITY, by a Mortgage for $

250,000 with a five year term filed in Book 6976, Page 1669—73 on November 12, 1996, as shown by the Oklahoma County Clerk's records.

3. FORREST "BUTCH" FREEMAN, as Treasurer of Oklahoma County, Oklahoma, by having a claim for taxes due upon the real property.

4. SHIRLEY DARRELL, EARL ROOMS and STUART EARNEST, Sr., as the Board of County Commissioners of Oklahoma County, Oklahoma, by a claim for taxes due upon the real property, and for any other claim they may have against the real property.

5. L. D. RHODES OIL CO., an Oklahoma corporation, and L. D. RHODES, an individual, by a claim or counter-claim for trespass, etc. upon and against said real property being condemned by the CITY OF OKLAHOMA CITY as per allegations in another pending Oklahoma County District Court Case No. CJ-95-6648-62, filed on September 29, 1995, and still pending.

WHEREFORE, the appraised value of this real property will be determined by the District Court and that amount (award) will be deposited into the District Court for all of the above defendants to make application for disbursal of said award.

WHEREFORE, Petitioner prays that the judge of this court select and summon, in the manner provided by law, three disinterested freeholders to inspect the property described hereinabove and consider the damages which the owners thereof will sustain by reason of Petitioner's use thereof and to assess the damage which said owners will sustain by reason of such appropriation of a fee simple title (less and except oil, gas and other minerals) to said property.

Respectfully submitted:

WILLIAM 0. WEST
Municipal Counselor

By: /s/ Jerry R. Fent

Jerry R. Fent, OBA # 2868
Assistant Municipal Counselor
The City of Oklahoma City
309 Municipal Building
200 North Walker
Ok1ahoma City, Oklahoma 73102
(405) 297—2696 or 297—2451

ATTORNEYS FOR THE PLAINTIFF
THE CITY OF OKLAHOMA CITY,
A Municipal Corporation

[Affidavit of Counselor omitted]

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2. City Council's 2/4/97 Resolution - attached as Exhibit "A" to City's 3/24/97 Condemnation Petition, *The City of Oklahoma City vs. Tal Technologies, Inc., et al.,* District Court of Oklahoma County, Oklahoma - Case No. CJ-97-2034-65.

[Plaintiff's Exhibit "A"]

MAPS Parcel Nos. 8016, 8018, 8019,

RESOLUTION

A RESOLUTION DECLARING THE NECESSITY FO ACQUIRING AND OWNING PROPERTIES IN FEE FO MAPS PARCEL NUMBERS 8016, 8018, AND 8019, FO THE PURPOSE OF THE MAPS CONSTRUCTION

OPERATION AND MAINTENANCE AND USES INCIDENTAL THERETO, OVER AND ACROSS CERTAIN REAL PROPERTIES LOCATED IN SECTION 3, TOWNSHIP 11N, RANGE 3W, I.M., IN OKLAHOMA COUNTY OKLAHOMA; AUTHORIZING, INSTRUCTING AND DIRECTING THE CITY MANAGER TO ACQUIRE AND OWN SAID PROPERTIES FOR SAID PURPOSE, BY PURCHASE AND SETTLEMENT OF THE DAMAGES WITH THE LANDOWNER; AUTHORIZING, INSTRUCTING AND DIRECTING FURTHER THAT THE MUNICIPAL COUNSELOR CONDEMN SAID PROPERTIES FOR SAID PURPOSES IF SAID PROPERTIES CANNOT BE PURCHASED AND THE DAMAGES SETTLED BY AGREEMENT WITH THE LANDOWNER; AND DECLARING AN EMERGENCY.

WHEREAS, on this 4th day of February, 1997 it is deemed necessary and advisable by The City of Oklahoma City to acquire and own fee simple title (Less and except oil and gas minerals) to properties located in Oklahoma County for MAPS Parcel Numbers 8016, 8018 and 8019, for the purpose of the MAPS Infrastructure/Parking for the use and the benefit of The City of Oklahoma City; and

WHEREAS, said properties are described as follows, to-wit:

(See Attached Exhibit "A")

WHEREAS, said properties above described are not owned by THE CITY OF OKLAHOMA CITY and it is immediately necessary for the City to acquire and own said described properties for MAPS Parcel Numbers 8016, 8018 and 8019 for the purpose of the MAPS Infrastructure/Parking.

NOW, THEREFORE, BE IT RESOLVED by the Council of The City of Oklahoma City that The City of Oklahoma City, pursuant to its power of eminent domain, take immediate steps

to acquire and own the above described properties for the purpose of the MAPS Infrastructure/Parking.

BE IT FURTHER RESOLVED that the City Manager of The City of Oklahoma City be, and he is hereby instructed, authorized and directed to immediately negotiate with the owner of the above described properties and purchase said properties for MAPS Parcel Numbers 8016, 8018 and 8019 and uses incidental thereto and settle the damages, if any, the owner thereof will sustain by reason of the appropriation and the taking thereof for the public purposes aforesaid;

AND BE IT FURTHER RESOLVED in the event the City Manager is unable to secure the above described properties or any part thereof, the Municipal Counselor of The City of Oklahoma City be, and he is hereby authorized, instructed and directed to institute condemnation proceedings against the owners of said properties and condemn said above described properties under the power of eminent domain for said purposes and to take such further legal steps or proceedings as may, in his judgement, appear to be properties to acquire said purposes and the immediate possession thereof.

WHEREAS, it is being immediately necessary for the preservation of the peace, health and safety of The City of Oklahoma City, and the inhabitants thereof, an emergency is hereby declared to exist, by reason whereof this Resolution shall take effect and be in force from and after its passage, as provided by law.

ADOPTED by the Council of The City of Oklahoma City this 4th day of February, 1997.

ATTEST:

/s/ Thomas P. Hurley
City Clerk

/s/ Ronald Norick
MAYOR

APPROVED as to form this 29th day of January, 1997

/s/ Susan D. Randall
Assistant Municipal Counselor

[Public Notary Stamp/Signature omitted]

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3. Answer of Defendant Tal Technologies, Inc. - *The City of Oklahoma City vs. Tal Technologies, Inc., et al.,* District Court of Oklahoma County, Oklahoma - Case No. CJ-97-2034-65 - filed April 17, 1997.

DISTRICT COURT OF OKLAHOMA COUNTY
OKLAHOMA
STATE OF OKLAHOMA

The City of Oklahoma City, such as it is, Plaintiff,	)	
vs.	)	Case No. **CJ-97-2034-65**
Tal Technologies, Inc., Defendant.	)	

ANSWER OF DEFENDANT TAL TECHNOLOGIES, INC.

Defendant Tal Technologies, Inc. ("Tal Tech"), appears herein through its undersigned counsel of record, and gives this its ANSWER to the Petition of The City of Oklahoma City ("City").

Tal Tech denies that the City needs the property for public parking, insofar as Tal Tech has already dedicated the property

to public parking. Tal Tech alleges that the City desires illegal (because of applicable state and federal antitrust laws) total control of all major public parking areas in the downtown and Bricktown areas, through COPTA, although the City's current management of said parking lots has been conducted with the same sort of ineptness and bureaucratic inefficiency with which the citizens of this county have come to expect from the City and its employees, generally.

Tal Tech alleges that the taking by the City is an unconstitutional and unnecessary taking insofar as Tal Tech has already dedicated the property to public parking, by way of the "Bricktown 2000" proposal which has been circulated by Tal Tech's president, Moshe Tal, since *1995 (i.e.,* years before the instant condemnation suit was brought).

WHEREFORE Tal Tech prays that the City take nothing by way of its Petition, and that Tal Tech's property not be appropriated by the City.

Respectfully submitted,

/s/ Jay D. Adkisson
Jay D. Adkisson, OB # 13095
620 Court Plaza Building
228 Robert S. Kerr Ave.
Oklahoma City, OK 73102
Ph: 405/235-4085
Fax: 405/235-4084

COUNSEL FOR TAL TECHNOLOGIES. INC.

[Certificate of Service Omitted]

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4. Petitioner's Exception to Commissioners' Report, *City of Oklahoma City vs. Tal Technologies, Inc., et al.,* District

Court of Oklahoma County, Oklahoma - Case No. CJ-97-2034-65 - filed June 30, 1997.

DISTRICT COURT OF OKLAHOMA COUNTY
OKLAHOMA
STATE OF OKLAHOMA

The City of Oklahoma City,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	**Case No. CJ-97-2034-65**
Tal Technologies, Inc.,	)	
	)	
Defendant.	)	

EXCEPTIONS TO REPORT

Defendant Tal Technologies, Inc. ("Tal Tech") respectfully excepts and objects to the Report of Commissioners which was filed herein on June 12, 1997, and shows as follows:

1) The value of the property as assessed by the Commissioners is far below the fair market value of the property, and well below the price average for comparable tracts which were recently sold.

2) The value of the property as assessed by the Commissioners does not take into account the best possible use of said property.

3) The value of the property as assessed by the Commissioners is far below the value of the property as assessed by other qualified appraisers.

4) Condemnation of the parcel for use as public parking i improper insofar as the City of Oklahoma City has *alread* transferred the property to Urban Renewal, which has publicl issued Requests for Proposals for the (non-parking) commerci development of the property.

5) Condemnation of the parcel for use as public parking improper insofar as the property was *already* dedicated t public parking by Tal Technologies, Inc.

Insofar as Tal Tech (by reason of its association wit Bricktown 2000) is a bidder for the property pursuant to Urba Renewal's Request for Proposal, Tal Tech moves to stay th matter pending resolution of the property.

Tal Tech also specifically requests a trial by jury, to consid these and other issues, as allowed by law.

Respectfully submitted,

/s/ Jay D. Adkisson
Jay D. Adkisson. OBA # 13095
620 Court Plaza Building
228 Robert S. Kerr Ave.
Oklahoma City, OK 73102
Ph: 405/235-4085
Fax: 405/235-4084

COUNSEL FOR TAL TECHNOLOGIES, INC.

[Certificate of Service omitted]

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5. City's Motion to Overrule Exception to Commissioner Report - *The City of Oklahoma City vs. Tal Technologies, Inc et al.*, District Court of Oklahoma County, Oklahoma - Ca No. CJ-97-2034-65 - filed July 24, 1997.

IN THE DISTRICT COURT OF OKLAHOMA
STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY, a municipal corporation,	)	
Plaintiff,	)	
vs.	)	Case No. **CJ-97-2034-65**
TAL TECHNOLOGIES, INC., an Oklahoma corporation, and BANK ONE, OKLAHOMA CITY, and FORREST "BUTCH" FREEMAN, as Treasurer of Oklahoma County, Oklahoma, and SHIRLEY DARRELL, EARL ROOMS and STUART EARNEST, SR.,as Board of County Commissioners, Oklahoma County, Oklahoma, and L.D. RHODES OIL CO., an Oklahoma corporation, and L.D. RHODES, an individual,	)	
Defendants.	)	

PLAINTIFF'S MOTION TO OVERRULE DEFENDANT'S EXCEPTIONS TO REPORT OF COMMISSIONERS AND GRANT PLAINTIFF POSSESSION AND TITLE TO PROPERTY

COMES NOW the plaintiff, the City of Oklahoma City, a municipal corporation ("City"), with the power of eminent

domain and moves this Court to overrule the defendant's exceptions to the "Report of Commissioners," confirm the Report, and grant the plaintiff possession, right of entry and title to the real property as shown in the Report. This eminent domain action is a "special proceedings" whose proceedings are strictly controlled by Article 2, Section 24, Oklahoma Constitution and 66 Okla. Stat. 1991 § 53 et seq. The plaintiff further states:

FACTS

1. The "Report of Commissioners" was duly filed in this case on June 12, 1997, in the amount of $50,000.

2. Title 66 Okla. Stat. 1991 § 55(A) allows the defendant! landowner 60 days to file a "written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury." On June 13, 1997, the defendant/landowner filed its demand for jury to "assess the value."

3. Title 66 Okla. Stat. 1991 § 55(A) also allows the defendant/landowner 30 days to file written exceptions questioning plaintiff's public purpose as to a need or necessity for the real property.

4. On June 30, 1997, the defendant TAL Technologies, Inc. ("Tal Tech") filed its exceptions questioning basically, (a) value of the Commissioners' Report; (b) condemning for "public parking" when Tal Tech offers its property for the same purpose; and (c) an alleged transfer or use by Oklahoma City Urban Renewal Authority ("OCURA") is an improper public use or unauthorized transfer. See defendant's exceptions, attached as Exhibit "A."

LEGAL ANALYSIS

5. For a ruling on the defendant's exceptions questioning the

public purpose for the "taking," the Court will decide the issue as provided in Article 2, Section 24, Oklahoma Constitution, which, in part, states:

> "* * * In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question."

The defendant Tal Tech's request for a jury to resolve its exception questions as shown on page 2 of its exceptions is in conflict with the above cited Oklahoma Constitutional mandate.

6. The plaintiff/condemnor's burden of proof on the issue of public necessity for the "taking" is discharged and a *prima fade* case is made with the presentation of a certified copy of the City's "Resolution of Necessity," whereupon the burden to proceed with the issue of public necessity shifts to the condemnee/ defendant/landowner. *Bush v. Oklahoma City,* 154 P.2d 960. 961 (Okla. 1944) in part, states:

> "We think it sufficient to say with respect to who has the burden of proof that in the case of Delfeld v. City of Tulsa, 194 Okl. 541, 131 P.2d 754, 143 A.L.R. 1032, we held that while nominally the burden of proof upon the affirmative of the issue of the necessity for the taking rests upon the condemnor, this burden is discharged and a prima facie case is made by the condemnor when it has introduced in evidence its proceedings initiating the condemnation proceedings including the resolution of necessity, whereupon the burden to proceed with the evidence shifts to the condemnee. We see no occasion to undertake a reconsideration of this rule for it seems to comport generally with the other authorities."

A certified copy of the City's "Resolution of Necessity" (that

was also attached to plaintiff's petition) is attached to this motion as Exhibit "B." The City's Resolution states said property is to be used for "MAPS Infrastructure/Parking" and the plaintiff's petition states for use as "public MAPS facilities * * * public park, parking, recreational and MAPS facilities." The City's MAPS Ordinance No. 52-23 is attached as Exhibit "C."

PARKING AND RECREATIONAL FACILITIES ARE PUBLIC PURPOSES

7. When determining whether the plaintiff's proposed public uses are authorized and/or the defendant's exceptions apply, we will look to statutory and case law precedence.

Public Purpose: General statutory authority for "public purposes" can be found in Title 11 O.S. 1991 §§ 22-104; 27 O.S. 1991 § 5, and Article 2, Section 24 of the Oklahoma Constitution. Pursuant to the constitution and statutes the City's "Resolution of Necessity" contain a determination that the MAPS project is a "public purpose." See the attached Exhibit "D."

Parking: Title 11 O.S. 1991 §§ 32-101; 32-102 and 32-103 authorize municipalities to acquire, maintain and operate (by purchase, gift or condemnation) public parking sites. See the attached Exhibit "E".

Parks and Recreational Facilities: Title 11O.S. 1991 §§ 22-104(2); 33-101; 33-103; 36-401 and 27 O.S. 1991 § 5 authorize acquiring real property for parks, recreation centers, facilities, buildings, etc. See the attached Exhibit "F."

8. The defendant's exceptions No. 1. 2 and 3 question the "value" of the property as determined by the Court appointed commissioners. Is this a proper subject for exceptions since the defendant has filed a demand for a jury trial to determine

"value?" No.! *Blankenship v. Bone,* 530 P.2d 578 (Okl. App. 1974) in part states:

> "* * *, defendants filed written exceptions to this report, * * *, objecting only upon the ground of inadequate compensation and incomplete description of the land in the appraisers' return and demanding a trial by jury."

And, on page 579 and 580 states:

> "We find that the defendants have waived any constitutional or other challenge to the plaintiff's right of condemnation by failing to include any such objections within thirty days in the written exceptions to the commissioners' report. It will be remembered that the only objections to the report were to the inadequacy of the damages and the incompleteness of the description of the property in the return. Those objections were, and are, preserved for trial which is still to be held in this case. Other objections were, and are, waived."

Therefore, any "value" objections included with any exceptions to "public purpose" carry no legal significance because the "value" issue is the only issue determined by a jury trial. The defendant's demand for a jury trial preserves this later issue and defendant's exceptions No. 1, 2 and 3 as to "value" should be overruled by this Court as grounds for exceptions. *Owens v. Oklahoma Turnpike Authority* 283 P.2d 827, 831 (Okl. 1954).

9. The defendant's exception No. 4 questions, (a) the property's use for public parking, (b) an alleged transfer to Oklahoma City Urban Renewal Authority ("OCUPA") and (c) some alleged proposal for (non-parking) commercial development.

It is established law in Oklahoma that property condemne by the City can be leased or rented to private parties fo compatible or similar uses in conformity with the origina public purpose. Examples, public lake property being leased fo private boat docks, bait shops, concessions, restaurants, etc. O public airport property being leased for private airport hanger airport industry, airport hotels, restaurants, etc. See *Sublett City* of *Tulsa.* 405 P.2d 185 (Okl. 1965) (public airport lan being leased to private industries) and *Oklahoma City v. Shadi* 430 P.2d 190 (Okla. 1967) (public airport land being leased t private industries).

OKLAHOMA CITY URBAN RENEWAL AUTHORITY CAN LEASE CITY'S CONDEMNED LAND

The Oklahoma City Urban Renewal Authority is anothe public governmental body with concurrent jurisdictiona boundaries within the City of Oklahoma City and may lease rent or operate the same City's public purpose. See City' memo and Resolution attached as Exhibit "G."

See the prior attached exhibits of Oklahoma statute allowing numerous public business and public parking to b owned by cities.

A parking facility to be constructed, owned and operated b a public trust formed by an association established pursuant t Interlocal Corporation Act was for "public purposes" and th trust had power to construct and operate such facility *Association of Southern Oklahoma Development Trust,* 470 P.2 572. 574 (Okl. 1970)

The provisions for off-street parking spaces is a "publi purpose" for which land may be taken by City of Malden unde statute authorizing the City of Malden to acquire by purchas or otherwise, or take by eminent domain, land and building for public parking space purposes. *Tate v. City of Maiden,* 13

N.E. 2d 188, 190 (Mass. 1956)

Under a statute authorizing a municipality to take privately owned land for public parking and garage areas, a lease of the acquired land by municipality to private individuals or corporations for garage and parking purposes was authorized as serving a "public purpose." *Deaihan Enterprises v. O Dwyer* 97 N.Y.S.2d, 326, 334 (N.Y. 1950)

Municipal off-street parking facilities are for a "public purpose." *Simmons v. City of Beauford* 83 S.E.2d 153, 155 (S.Carolina 1954)

The taking of land by a municipality to provide off-street parking places in proximity of major league baseball field in order to allow a better flow of the traffic congestion generally generated by ball games was for a "public purpose." *Superior Laundry & Towel Supply Co. v. City of Cincinnati* 168 N.E.2d 445, 446 (Ohio 1959)

10. The defendant's exception No. 5 questions the taking for "public parking" when defendant alleges its property is already dedicated to public parking.

At the time this eminent domain action was filed on March 25, 1997, all of the real property was owned by the private party-defendant, Tal Tech, as shown by a Warranty Deed filed in Book 6093, Page 360 on September 24, 1990, and a Warranty Deed filed in Book 6235, Page 995 on December 9, 1991, and a right-of-way easement filed in Book 6093, Page 369 on September 24, 1990, of the Oklahoma County Clerk's office. All of Tal Tech's property was private property. See the attached Exhibit "H."

The City Council of the plaintiff has never accepted a plat, partial plat , or deed dedication for public parking upon the Tal Tech property.

11. The plaintiff has deposited the award of $50,000 into Court plus fees, Court costs and poundage as of the 11th day of July, 1997 and is therefore entitled to possession as per Article 2, Section 24, Oklahoma Constitution, which, in part, states:

"* * *. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. * * *."

See the District Court receipt and City Claim form attached as Exhibit "I."

WHEREFORE, the plaintiff prays the Court to overrule the defendant's exceptions to the "Report of Commissioners;" confirm the Report, and grant the plaintiff possession, right of entry and title to the real property as shown in the Report.

DATED this 24th day of July, 1997.

Respectfully submitted,

WILLIAM 0. WEST
Municipal Counselor

By: /s/ Jerry R. Fent
Jerry . Fent, OBA #2868
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ATTORNEYS FOR THE PLAINTIFF
THE CITY OF OKLAHOMA CITY
a municipal corporation

[Notice of Hearing, Certificate of Service and Exhibits omitted]

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6. TTI's Response to City's Motion to Overrule Exceptions to Commissioners' Report, *City of Oklahoma City vs. Tal Technologies, Inc., et al.*, District Court of Oklahoma County, Oklahoma - Case No. CJ-97-2034-65 - filed 8/22/97.

DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

The City of Oklahoma City,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	Case No. **CJ-97-2034-65**
Tat Technologies, Inc.,	)	
	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO OVERRULE DEFENDANT'S EXCEPTIONS TO REPORT OF COMMISSIONERS, ETC.

Defendant Tal Technologies, Inc. ("Tat Tech") respectfully excepts and objects to the Plaintiff's Motion to Overrule Defendant's Exceptions to Report of Commissioners, etc., for the grounds and upon the reasons which follow:

OKC's ¶ 5 quotes the Oklahoma Constitution for the proposition that "the determination of the character of the use shall be a judicial question." [Article 2 § 24].

OKC's ¶ 6 through 8 essentially argues that Tat Tech waived its right to contest the fact that Tat Tech had previously

dedicated its land to private parking — which is the same use for which OKC condemned the property — because Tat Tech allegedly did not include this argument in its Exceptions to Report filed herein on June 30, 1997. OKC's allegation is false insofar as the Exceptions to Report stated in para. 5 as follows:

> 5) Condemnation of the parcel for use as public parking is improper insofar as the property was *already* dedicated to public parking by Tat Technologies, Inc.

See Exhibit "A" to OKC's Motion, at page 1. This issue was explicitly raised in Tat Tech's Answer filed herein, and it is patently false to now suggest that Tat Tech neither raised nor preserved this particular objection. OKC's brief by its citation to the *Blankenship* case[2] also falsely leaves the impression that these objections are improper *because* they were included in the Exceptions to Report (which they were), when such objections were held to be improper in the *Blankenship* case only because they were filed "substantially more than thirty days after the filing of the [Sic] appraisers' (commissioners') report." 530 P.2d at 579.

In this case, Tal Tech stated its objections to the taking of the property in its Answer, and reiterated those objections, along with its objections as to the value returned by the commissioners and other objection, well within thirty days in its Exceptions to Report. Thus, OKC's arguments that Tal Tech has somehow "waived" any of its objections are completely without merit.

OKC's ¶ 9 attempts to refute Tal Tech's argument that OKC cannot lawfully condemn Tal Tech's property for the same purpose (parking) that Tal Tech intended to use the land for. In other words, OKC claims that it has the power to condemn

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[1] *Blankenship v. Bone,* 530 P.2d 578 (Okla.App. 1974).

property for a public purpose even if the land is already being used for that purpose. Not so, said the Oklahoma Supreme Court in *City of Prior Creek v. Public Service Co., 536* P.2d 343 (Okla. 1975), wherein it was held a municipality can not condemn property for the same purpose for which it is already intended to be used by the present owner:

> The general rule is that property already legally appropriated to a public use is not to be afterwards taken by a municipality for a like use unless the intention of the Legislature that it should be so taken has been manifested in express terms or by necessary implication. * * * To hold otherwise would amount simply to the taking of property from one and destroying his right to operate although expressly authorized to do so, and giving it to another without any benefit to the public.

536 P.2d at 346.

Tal Technologies' President, Moshe Tal, has since 1995 (well before the condemnation of his property) championed the development of the subject and surrounding parcels into multiple-story parking garages, etc., and has included Tal Tech's property in those plans. It is not necessary that his land by "pledged" for parking, it is enough that Tal Tech legally owns the land and intends to use it for this purpose (and OKC presents neither contrary evidence nor contrary legal authority). What OKC hopes to do is take Tal Tech's land and use it for the same purpose for which Tal Tech intends to use it, and this is precisely what is improper under the *City of Prior Creek* opinion.

The Motion should be OVERRULED in all its particulars.

Respectfully submitted,

/s/ Jay D. Adkisson
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Ph: 405/235-4085
Fax: 405/235-4084

COUNSEL FOR TAL TECHNOLOGIES, INC.

[Filed stamped 8/22/97 - Certificate of Service omitted]

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7. City's Reply to Petition's Response to City's Motion t
Overrule Exception to Commissioners' Report, *City o*
Oklahoma City vs. Tal Technologies, Inc., et al., Distric
Court of Oklahoma County, Oklahoma - Case No. CJ-97
2034-65 - filed, 8/25/97.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY, a municipal corporation,	)	
Plaintiff,	)	
vs.	)	**Case No. CJ-97-2034-6**
TAL TECHNOLOGIES, INC., an Oklahoma corporation, and BANK ONE, OKLAHOMA CITY, and FORREST "BUTCH"	)	

FREEMAN, as Treasurer of)
Oklahoma County, Oklahoma,)
and SHIRLEY DARRELL, EARL)
ROOMS, and STUART)
EARNEST, SR., as Board of)
County Commissioners,)
Oklahoma County, Oklahoma,)
and L.D. RHODES OIL CO., an)
Oklahoma corporation, and L.D.)
RHODES, an individual,)
)
Defendants.)

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE AS TO OVERRULING DEFENDANT'S EXCEPTIONS TO REPORT OF COMMISSIONERS

COMES NOW the plaintiff, the City of Oklahoma City, a municipal corporation ("City"), with the power of eminent domain and files its reply to defendant's response as to the overruling of defendant's exceptions to the "report of commissioners."

The City further replies:

I.

WHERE CITY FILED ITS MOTION TO OVERRULE DEFENDANT'S EXCEPTIONS ON JULY 24, 1997 AND DEFENDANT DID NOT FILE A RESPONSE UNTIL AUGUST 22, 1997; RULE 4(e) OF THE DISTRICT COURTS DEEM THE CITY'S MOTION SHALL BE CONFESSED IF NOT CONTESTED WITHIN FIFTEEN DAYS.

The City filed its Motion to overrule the defendant's exceptions questioning the City's public purpose as to

condemning defendant's land on July 24, 1997. The defenda filed its response on August 22, 1997 (or 28 days later). Ru 4(e) of the District Court rules deems the City's motion shall confessed if not contested (or opposed) within fifteen days.

Where a statute or rule uses "shall" the common meani of the word is "must." State v. Hunt, 286 P.2d 1088, 10 (Okl. 1955).

II.

THE QUESTIONING OF "VALUE" IS A JURY QUESTION FOR A LATER JURY TRIAL AND IS NOT QUESTION FOR CONTESTING "PUBLIC PURPOSE" BY EXCEPTIONS.

The defendant's response is confusing and conflicting as current law of eminent domain. The defendant's first thr paragraphs of its exceptions question the determination "value" within the "report of commissioners." Value is not issue related to questioning "public purpose.

The question of "value" is heard by a jury at a later da The defendants have preserved this issue by filing its dema for jury trial. See attached Exhibit "A." This is not a "waiver" defendant but an issue at a later stage.

The question of "public purpose" is a judicial questio Article 2, Section 24, Oklahoma Constitution. The City ci numerous statutes granting City authority to condemn parking, parks, recreational facilities, streets, etc. See City Motion filed in this case. This is the reason for the "exceptio hearing of August 28, 1997. The property is now the City property due to the depositing of the award into Court.

III.

THE RULE THAT A CITY CANNOT CONDEMN A PUBLIC UTILITY'S ELECTRIC DISTRIBUTION FACILITIES FOR THE SANE PUBLIC PURPOSE DOES NOT APPLY TO DEFENDANT'S PRIVATE LAND.

The defendant's land is not dedicated for public parking. The land in question is in "high weeds" with no parking available. Numerous statutes grant City authority to condemn for public parking.

The case of *City of Pryor Creek v. Public Service Co.* not *Oklahoma,* 536 P.2d 343 (Okl. 1975) cited by defendants consists of condemnation of personal property used by a public utility in the form of electric distribution facilities. The City wanted to use these same electric lines for its municipal electrical service. No statute grants authority to condemn a public utility company's property.

The correct holding of *Public Service,* supra. page 347, states:

> "The power of a municipality to take property of a public service corporation for public utility purposes must rest upon legislative authority either granted expressly or by necessary implication. General authority to exercise the power of eminent domain is insufficient. A charter provision which attempts to designate authority to a city to condemn a public utility is void. All provisions in the charter of a municipality must be consistent with and are subject to the Oklahoma Constitution and the general laws of the state. Okla.Const.Art. 18 § 3(a)."

Thus, said ruling is only controlling as to public utility condemnations.

IV.

ALL OTHER ARGUMENTS BY DEFENDANT'S RESPONSE HAVE BEEN ANSWERED IN CITY'S PREVIOUSLY FILED MOTION.

The City's motion should be sustained as to questions of law of public purpose.

DATED this 25th day of August, 1997.

Respectfully submitted,

WILLIAM 0. WEST
Municipal Counselor

By: /s/ Jerry R. Fent
Jerry R. Fent, OBA #2868

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(405) 297-2696 or 297-2451
ATTORNEYS FOR THE PLAINTIFF
THE CITY OF OKLAHOMA CITY

[Notice of Hearing, and Certificate of Service omitted]

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8. City's Motion to Vacate or Modify Order Overruling TTI's Exceptions to the Commissioners' Report, *City of Oklahoma City vs. Tal Technologies, Inc., et al.,* District Court of Oklahoma County, Oklahoma - Case No. CJ-97-2034-65 - filed 9/8/97.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY, a municipal corporation,	)	
Plaintiff,	)	
vs.	)	*Case* No. **CJ-97-2034-65**
TAL TECHNOLOGIES, INC., an Oklahoma corporation, and BANK ONE, OKLAHOMA CITY, and FORREST "BUTCH" FREEMAN, as Treasurer of Oklahoma County, Oklahoma, and SHIRLEY DARRELL, EARL ROOMS and STUART EARNEST, SR., as Board of County Commissioners, Oklahoma County, Oklahoma, and L.D. RHODES OIL CO., an Oklahoma corporation, and L.D. RHODES, an individual,	)	
Defendants.	)	

MOTION OF THE PLAINTIFF, THE CITY OF OKLAHOMA CITY, TO VACATE OR MODIFY ORDER OVERRULING DEFENDANT'S EXCEPTIONS TO THE REPORT OF COMMISSIONERS

COMES NOW the Plaintiff, the City of Oklahoma City, a municipal corporation ("City"), and pursuant to 12 Okla. Stat. Supp. 1994 § 1031.1, respectfully moves the Court to Vacate or Modify its Order Overruling Defendant's Exceptions to the Report of Commissioners, and in support thereof, would show

the court as follows:

1. That this is action in eminent domain wherein the Plaintiff City is condemning certain real property owned by the Defendants, located in Oklahoma County ("Subject Property") for the public purposes specifically set forth in Petition filed herein.

2. That all Defendants were duly served with Notice as required by law and this Court has jurisdiction over both the parties and Subject Property.

3. That on June 12, 1997, the Report of Commissioners was filed herein assessing damages to the Defendants in the amount of $50,000.00 for the condemnation of the Subject Property.

4. On June 30, 1997, the Defendant TAL Technologies, Inc., filed Exceptions to Report challenging the public purpose for the condemnation of the Subject Property i.e., MAP's Parcels No. 8016 and 8019.

5. On July 24, 1997, the Plaintiff City filed its Motion to Overrule Defendant's Exceptions to Report of Commissioners.

6. That on August 28, 1997, the Court held a hearing and heard arguments on the Defendant's Exceptions to Report and Plaintiff's Motion to Overrule said Exceptions, at the conclusion of which the Court ruled in favor of the Plaintiff City and approved an Order Overruling Defendant's Exceptions and Confirming Report of Commissioners and Granting City of Oklahoma City Possession, Title and Right of Entry, which Order had been prepared and was signed by Jerry R. Fent as counsel of Plaintiff City. (A certified copy of said Order is attached hereto as Exhibit "A").

7. That said Order was erroneously and improperly submitted to the Court and to counsel for the Defendants for execution for the following reasons:

   (a) The Order contains misstatements of the applicable Oklahoma law, specifically with respect to the findings set forth in paragraph 10, wherein it is stated that "... City when condemning a fee simple title by eminent domain cannot thereafter convey a fee simple title to a third party private or governmental entity..." which is directly contrary to the cited authority, the same being the Oklahoma Supreme Court cases of *Sublett v. City of Tulsa,* 405 P.2d 1851 (Okla. 1969) and *Oklahoma City v. Shadid,* 430 P.2d 190 (Okla. 1967); and

   (b) Counsel for the Plaintiff City, exceeded his authority by incorporating in said Order the second paragraph of page 5 in the Court's Decree which recites the same erroneous statements of Oklahoma law as referenced above with respect to paragraph 10. (See the Affidavit of William O. West, Municipal Counselor, attached hereto as Exhibit "B").

WHEREFORE, the Plaintiff, the City of Oklahoma City, respectfully moves the Court, for the reasons cited above, to modify its Order Overruling Defendant's Exceptions by the deletion of Paragraph 10 of the Court's Findings and the second paragraph on page 5 of the Court's Decree or in the alternative to vacate the entire Order and grant the Defendant TAL Technologies another hearing on its Exception to Report.

Respectfully submitted,

WILLIAM 0. WEST
Municipal Counselor

By:/s/ Daniel T. Brummitt

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Oklahoma City, Oklahoma 73 102
(405) 297-2451
ATTORNEYS FOR THE PLAINTIFF
THE CITY OF OKLAHOMA CITY

[Certificate of Service and Exhibits omitted]

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9. TTI's Response to City's Motion to Vacate or Modify Orde Overruling Exceptions to commissioners' Report *The City o Oklahoma City vs. Tal Technologies, Inc., et al.,* Distric Court of Oklahoma County, Oklahoma - Case No. CJ-97 2034-65 - filed 10/1/97.

DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

The City of Oklahoma City,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	Case No. **CJ-97-2034-65**
Tal Technologies, Inc.,	)	
	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION
FOR REHEARING, ETC.

Defendant Tal Technologies, Inc. ("Tal Tech") respectfull excepts and objects to the Plaintiff's Motion for Rehearing, etc

for the grounds and upon the reasons previously stated.

OKC claims that it has the power to condemn property for a public purpose even if the land is already being used for that purpose. Not so, said the Oklahoma Supreme Court in City of Prior Creek v. Public Service Co., 536 P.2d 343 (Okia. 1975), wherein it was held a municipality can not condemn property for the same purpose for which it is already intended to be used by the present owner:

> The general rule is that property already legally appropriated to a public use is not to be afterwards taken by a municipality for a like use unless the intention of the Legislature that it should be so taken has been manifested in express terms or by necessary implication. * * * To hold otherwise would amount simply to the taking of property from one and destroying his right to operate although expressly authorized to do so, and giving it to another without any benefit to the public.

536 P.2d at 346.

Tal Technologies' President, Moshe Tal, has since 1995 (well before the condemnation of his property) championed the development of the subject and surrounding parcels into multiple-story parking garages, etc., and has included Tal Tech's property in those plans. It is not necessary that his land by "pledged" for parking, it is enough that Tal Tech legally owns the land and intends to use it for this purpose (and OKC presents neither contrary evidence nor contrary legal authority). What OKC hopes to do is take Tal Tech's land and use it for the same purpose for which Tal Tech intends to use it, and this is precisely what is improper under the City of Prior Creek opinion.

The Motion should be OVERRULED in all its particulars.

Respectfully submitted,

/s/ Jay D. Adkisson
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COUNSEL FOR TAL TECHNOLOGIES, INC.

[filed 10/1/97 - Certificate of Service omitted]

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10. TTI's Motion to Reconsider and Modify Orders August 28, 1997, and October 2, 1997, ... Alternatively, for Temporary Injunction, wi Incorporated Brief in Support, *The City of Oklaho City vs. Tal Technologies, Inc., et al.,* District Court Oklahoma County, Oklahoma - Case No. CJ-97-203 65 - filed 9/28/99.

IN THE DISTRICT COURT, 7TH JUDICIAL DISTRICT
OKLAHOMA COUNTY, STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY, a municipal corporation,	)	
Plaintiff,	)	
vs.	)	Case No. CJ-97-2034-
TAL TECHNOLOGIES, INC., an Oklahoma corporation, et al.,	)	

)
Defendants.)

MOTION OF DEFENDANT TAL TECHNOLOGIES, INC. TO RECONSIDER AND MODIFY ORDERS OF AUGUST 29,1997, AND OCTOBER 2, 1997, GRANTING PLAINTIFF POSSESSION OF AND TITLE AND RIGHT OF ENTRY TO PROPERTY IN QUESTION OR, ALTERNATIVELY, FOR TEMPORARY INJUNCTION, WITH INCORPORATED BRIEF IN SUPPORT

COMES NOW Defendant TAL TECHNOLOGIES, INC. (TTI) and respectfully moves this Court to either (a) reconsider and modify its Orders awarding TTI's property to Plaintiff THE CITY OF OKLAHOMA CITY (The City) by rescinding those Orders and that award, or (b) for a temporary injunction preventing The City and its agent, the OKLAHOMA CITY URBAN RENEWAL AUTHORITY (OCURA),[3] from transferring the property to a third party until TTI's rights and appeals have been decided in finality. In support, TTI shows the Court the following:

BACKGROUND OF DISPUTE AND POSITION

TTI is a corporation which owns two parcels of land near the Bricktown Area of Oklahoma City. These two parcels have been designated as Parcels Nos. 8016 & 8019 in this litigation.

TTI entered into an agreement with a developer, BRICKTOWN 2000, INC. (BT 2000), to dedicate for public use Parcels Nos. 8016 & 8019 by way of a proposal to The City for

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[1]. The OCURA is considered an agent of The City by virtue of its written agreement with The City denominating it as an agent of The City any by the Oklahoma Attorney General's Opinion No. 68-144 of 3/21/68.

a public parking and retail development along the canal.

After TTI made its designation and proposal, The Cit decided to condemn the parcels under its statutory eminer domain powers. The City alleged that the parcels were neede for parking, public recreation and parks associated with i Metropolitan Area Projects development plans (called "MAPS"

This Court has entered two Orders granting The City i condemnation request.

TTI contends (a) condemnation is improper where th alleged public purpose is already the use of the land sought t be condemned; (b) TTI has discovered that the parcels wer never part of the MAPS plan and thus the claim of need fo MAPS is false and deceived the Court; (c) the parcels hav since the Court's Orders, been transferred to The City's agen OCURA, for the purpose of selling the parcels to a privat developer who will use the property, not for parking, publ park or any public recreation, as The City told this Court, bu for-profit restaurants and retail shop.[4]

TTI seeks reconsideration and withdrawal of the Orders an restoration of the parcels to TTI as the alleged reasons by Th City were false and deceptive. Alternatively, TTI seeks temporary injunction to prevent The City, whether separate or through its agent OCURA, from further transferring th property, otherwise TTI will be irreparably harmed before th ruling can be properly challenged on appeal. The trial on th valuation is not slated for some time yet and a final, appealab

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2. At the hearing on the condemnation issue in 1997, TTI advised this Court that this type of transaction would occur, but that argument was dismissed as being without proof or basis. Now, however, the advice has proven to be prophetic as the predicted transfer did occur.

judgment does not accrue until that valuation trial has finished.

STATEMENT OF FACTS

1. On October 13, 1993, the Council of The City of Oklahoma City ("The City") passed a Resolution to seek the voters' approval of an Ordinance for the Metropolitan Area Projects plan (called "MAPS"). MAPS provided specifically for the construction of dams along the North Canadian River with recreation areas, a canal, and public parking facilities; construction of a metropolitan learning center; construction of a baseball stadium; improvement of the Myriad Convention Center; improvement of the Civic Center Music Hall; improvement to the Fairgrounds; construction of a sport arena; and other supplemental projects (transportation links, etc.), all to be financed by a limited five (5) years public sales tax increase of one percent (1%). On December 14, 1993, the citizen voted in favor of MAPS. *See Ordinance No. 20,045* - Exhibit **"A"**.

2. After the MAPS ordinance was adopted, a Master Plan was created to specify exactly how the public funds would be spent in compliance with the MAPS Ordinance. The Master Plan provided for parking, but DID NOT INCLUDE the parcels at issue here, specifically Parcels Nos. 8016 and 8019 (which were owned by Defendant TTI). *See MAPS 10/13/94 Master Plan* - Exhibit **"B"** (pages 46, 48, 49, 50 51 and 52 only attached due to length of entire plan). *Also see MAPS 1/30/95 Canal Design drawing* - Exhibit **"C"**. All shows the public parking lots to be adjacent and west of TTI's Parcels 8016 & 8019. Also see Affidavits of Mark Deal and David R. "Dusty" Martin.

3. Defendant, Tal Technologies Inc. ("TTI"), through its

president Moshe Tal ("Tal"), entered into a lease[5] a promised to dedicate Parcels Nos. 8016 & 8019 for pub parking and retail development along the canal.[6] created a plan to develop part of the adjacent ar designated for MAPS projects, and added his corporatio land as an incentive, which parking would be not just surface lot (as had been designed by MAPS coordinator but an actual parking garage to provide more th adequate parking spaces for the current projects and futu expansion. *See BT 2000's June 7, 1995 Proposal Bricktown Parking Plaza Development* - Exhibit **"D"**; *2000's June 9, 1995 letter to Mayor and City Counci* Exhibit **"E"**; November 4, 1995 Daily Oklahoman's Arti - Exhibit **"F"**; *BT 2000's November 22, 1995 Proposa* Exhibit **"G"**; *BT 2000's February 14, 1996 letter Municipal Counselor* - Exhibit **"H"**; *March 29, 1996 let from Municipal Counselor to BT 2000* - Exhibit **"I"**, and *drawing* submitted by BT 2000 and Tal during a Febru 13, 1996 meeting with Mayor Ron Norick - Exhibit " (showing BT 2000 dedication of Parcels 8016 & 8019 parking).

4. On March 25, 1997, about two years AFTER Tal notif the City of his corporation dedication, The City filed present action under its eminent domain powers condemn the very land which TTI, via BT 2000, h already dedicated for public parking.

5. The City's Petition for condemnation advises this Court t The City seeks Parcels Nos. 8016 & 8019 by "*a fee sim*

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[3] TTI enter into an agreement with its affiliated company Bricktown 2000, Inc. ("BT 2000").

[4] TTI's Parcels are located directly south of the Ballpark from the south edge of the canal to Interstate 40.

title ...[for] public MAPS facilities". See Petition, page 1.

6. The City's Petition for condemnation further advises this Court that ... *"Petitioner needs the said property* [Parcels Nos. 8016 & 8019] *for public park, parking, recreational and MAPS facilities." See Petition, page 3.* The Petition gives no additional detail or plans beyond the extremely vague description.

7. The City's Petition attached the underlying City Resolution for condemnation declaring that the parcels here are needed *"for the purpose of the MAPS Infrastructure/Parking." See Resolution dated February 4, 1997.* Again, however, the MAPS Plan DID NOT include Parcels Nos. 8016 & 8019, nor does the Petition or City Resolution provide any details as to why these parcels are needed or how they come within the MAPS project (other than they are located in Oklahoma City proper or along the Canal - just like other Bricktown properties).

8. On June 24, 1997, The City passed a Resolution designating the area south of Reno and north of I-40 (including TTI's property) as sports and entertainment district along the line of BT2000 and Tal's proposal (i.e., parking, and entertainment/retail). The City appointed the Oklahoma City Urban Renewal Authority ("OCURA") to act as its agent in soliciting development proposals. BT 2000 was invited and submitted it proposal. *See BT 2000 July 17, 1997 Proposal* - see the lengthy Exhibit attached to Tal's Affidavit filed August 28, 1997. BT 2000 included Parcels 8016 & 8019 for retail development along the canal and supportive/public parking behind. But is should be noted that this is a separate development and not "MAPS."

9. On July 28, 1997, the OCURA conditionally designated TMK/Hogan for Phase I development of parking and entertainment, and BT2000 for Phase II development along

the eastern parcels of OCURA. The TMK/Hogan (and its affiliated BPI) parking plan DID NOT INCLUDE any parking on Parcels 8016 or 8019. *See* Parking Drawing and Permit – Exhibit "**K**".

10. This Court entered two separate Orders of condemnation, the first only permitting The City to lease the land and the later one allowing The City to transfer the land.

11. Within months of this Court's Order of condemnation, The City, by Resolution dated November 4, 1997 (Exhibit **"L"**), deeded property, including Parcel 8016 & 8019 to the ("OCURA"), an entity not associated with the MAPS project, and an entity that by law and agreement, acts as The City's agent. In essence, The City took property under the disguise of MAPS which was never included in MAPS and then transferred the property acquired with MAPS tax money to another agency which had no involvement with MAPS. The City's Resolutions of June 24, 1997 and November 4, 1997 effectively modified the voted December 14, 1993, Ordinance WITHOUT submitting said modifications to the voters.

12. On May 20, 1998 (almost one year after the original designation of OCURA), the OCURA and The City decided to cancel BT 2000's designation and gave the entire development rights to TMK/Hogan.

13. On July 21, 1998, the City Council passed a Resolution approving the OCURA designation of TMK/Hogan for a development of the area south of Reno for a multi-screen and IMAX theater (the "cinema complex"), as well as public parking. In its presentation to City Council, TMK/Hogan stated that they need the entire 30 acres (including Parcels Nos. 8016 & 8019) for the

cinema complex and public parking.

14. It has recently come to light that the specific development plan of the developer, TMK/Hogan, which has been approved to develop land from the OCURA, including TTI's land, designated Parcels Nos. 8016 & 8019 as, not public parking, public recreation or park, nor for the cinema complex site, but rather for restaurant, retail shops and some parking to support those endeavors. *See City Resolution of January 12, 1999, adopting TMK/Hogan Development Plan and Drawings* - Exhibit **"M"**(relevant parts showing restaurant and retail 12K planned on TTI parcels).

15. The record also shows that The City and OCURA has modified the location of the MAPS public parking by splitting it into two lots - one lot further west of TTI's parcels (approximately 1,000 feet away), and the second parking lot further east of TTI's parcels (and on the north side of the canal). Thus, the modified MAPS parking lots are not even adjacent to TTI's property anymore. See drawing of parking lots sites - Exhibit **"K"**.

16. TMK/Hogan has stated to the Oklahoma Supreme Court in a brief filed September 23, 1999, that the intention for the area of TTI's Parcels Nos. is planned for "retail, restaurant and entertainment venue" with parking now planned well North of the area. See - Exhibit **"N"**, Suggestion and Brief of TMK/Hogan in *The City of Oklahoma City vs. The Oklahoma Urban Renewal Authority, et al., Okla. Sup. Ct. No. 92,874,* at pp. 2-3.

17. It is now self-evident that TTI's parcels were never intended for MAPS, but that MAPS was used as an excuse to condemn the land which would then be

transferred to a city agency and then sold to a private developer, who will then handsomely profit from developing the land while providing no public parking, public park or MAPS infrastructure.

18. Also, The City illegally condemned property alleging the very same purpose for which the property was designated, i.e., public parking, and then never used the property for the purpose it claimed.

19. Furthermore, The City, via its agent OCURA, will effectively transfer the parcels in dispute here to a competitor of BT 2000, thereby using public funds, law and money to rob one private entity of its valuable property and then sell (at a reduced price) that valuable property to another private entity which will profit therefrom. In essence, The City uses its powers and public tax dollars to provide profit to a private entity at the expense of another private entity.

20. The manner and method used by The City in condemning TTI's land is clearly an abuse of its eminent domain powers, bad faith and by fraudulent activities.

ARGUMENTS AND AUTHORITIES OF LAW

1. Propriety of TTI's request to reconsider and modify the Orders allowing the transfer of TTI's parcels to The City.

TTI is not beyond the allowable time to file for reconsideration and modification of this Court's Orders allowing the condemnation and ordering transfer of the parcels. Those Orders are interlocutory orders subject to review and modification.

Under Oklahoma law a judgment is the final order which determines the rights of the parties. *12 O.S. Sec. 681.* The determination of all issues results in a final, appealable judgment. *Eason Oil Co. v. Howard Engineering, Inc.,* 1988 OK 57, 755 P.2d 669.

Disposition of a portion of a case is an interlocutory adjudication and is subject to alteration or modification at any time by the trial court. *Mann v. State Farm Mutual Automobile Insurance Co.,* 1983 OK 84, 669 P.2d 768. For example, judgment for delivery of property is not a final order where the court reserves decision on any issue. *Emerson v. Lewis,* 1954 OK 245, 274 P.2d 529. By way of contrast, a final judgment ends a particular action and leaves nothing else for the court to do with regard to determining the rights of the parties. *Carroll v. State,* 1921 OK --, 80 Okla. 89, 194 P. 219.

At bar, there is no final order or final judgment from where TTI could appeal or from where time limits to challenge a final judgment apply. There are simply two Orders which grant part of the relief, *i.e.* transfer of title, but which have not determined all of the issues, *e.g.* damages for the public taking.

For these reasons, under Oklahoma law, TTI is timely in presenting this motion.

2. TTI has consistently, timely and properly contested The City's alleged necessity and legality of the taking.

The record shows that from the very beginning of this cause of action, the Defendant TTI has challenged the legality and the necessity of the taking of its property by The City as follows:

1. In its April 14, 1997 Answer, TTI has denied that the City needs the property for public parking, and further alleged that the taking by the City is an unconstitutional and

unnecessary. *See Answer, page 1.*

2. In its June 30, 1997 *Exceptions To Report*, TTI again challenged the legality and necessity of the taking insofar as the property was already dedicated to public parking by TTI. *See Exception to Report*, page 1, ¶ 5. In this pleading, TTI also challenged the impropriety of The City's intent to transfer the property to the OCURA which issued a Request for Proposal for non-parking commercial development of the property.

3. In its August 22, 1997 *Response to Plaintiff's Motion to Overrule Defendant's Exceptions to Report of Commissioners*, TTI again alleged and challenged the necessity of the taking as well as the legality of the taking and in support, TTI cited the Oklahoma Supreme Court decision in the case of the *City of Pryor Creek v. Public Service Co.*, 1975 OK 81, 536 P.2d 343.

4. In support of its Response, TTI filed, on August 28, 1997, the Affidavit of Moshe Tal which detailed the circumstances and supports TTI's position as to the fact that TTI, for years before the taking by the City, has already dedicated its land for the same purpose in which the City is claiming the need here. BT 2000's July 17, 1997, plan was attached as an exhibit to Tal's August 28, 1997, Affidavit.

5. In its October 1, 1997, *Response to Plaintiff's Motion for Rehearing*, TTI again claimed that The City cannot condemn property for the same purpose for which it is already intended to be used by the present owner, and again recited and quoted the Oklahoma Supreme Court's ruling in the *City of Pryor Creek* case.

3. The City has failed to show any reasonable necessity for condemning and taking the property of TTI.

In all of its pleadings, The City constantly stated that it

needed the TTI's parcels for public parking, park and public recreational use. *See City's Petition*, page 3, *City's 2/4/97 Resolution*, page 1, and City's July 24, 1997 *Motion to Overrule Defendant's Exception to Report ...*, pp. 3-4.

While it is true that the introduction of the City Council Resolution for necessity makes a sufficient *prima facie* showing of necessity, it is not conclusive proof it and of itself in the face of evidence to the contrary. *Where landowners responded to eminent domain petition with allegations that there was no reasonable necessity for taking of their property for purpose alleged by county, burden shifted to condemnor to establish, in first instance, that such a reasonable necessity existed. Katz v. Dade County*, 367 So.2d 277 (Fla. App. 1979). The City here failed to show a reasonable necessity for the taking of TTI's parcels in order to serve the public purpose it asserted for the condemnation.

The City's Resolution and/or City Charter DOES NOT give the City the power to "overrule" restrictions placed by the Legislature when enacted the eminent domain law. In *City of Pryor Creek v. Public Service Co.*, 1975 OK 81, 536 P.2d 343, the Oklahoma Supreme Court held:

> The [Oklahoma] Constitution and general laws of state-wide concern control over conflicting city charters. The power of eminent domain is of state-wide interest and importance. **This right cannot be extended and expanded by provisions of the city charter**. (Emphasis and in brackets added)

Pryor, 536 P.2d at 346.

> An examination of the Constitution and statutes of the State of Oklahoma discloses that **authority has not been granted to a municipal corporation to**

> **take**, either expressly or by implication, under the power of eminent domain, **property already devoted to the same public use for which the municipality seeks to condemn it.** (Emphasis added).

Pryor, supra, at 347. *See also Oklahoma City v. Local Federal Savings & Loan Ass'n,* 1943 OK --, 134 P.2d 565, 575 (forbidding taking of property under alleged public use where the property is already designated for public use).

Therefore, the City Council's Resolution attached to the City's Petition for condemnation in this cause of action, is improper under law and therefore invalid since it extended and expanded beyond the perimeters of the powers given by the Legislature and by the Oklahoma Constitution by condemning land for the very same use . Furthermore, the alleged *prima facie* by use of The City's invalid Resolution is likewise illusorous and simply not reached here.

Also see, *Missoula v. Mountain Water Co.,* 228 Mont. 404, 743 P.2d 590 (1987), where the court declared that the expressed need by a city was but one factor only in considering a challenge to the claimed necessity, and not self-determinative.

4. The City deceived and defrauded this Court by claims of MAPS usage for property where the parcels were never included in MAPS and are not now included for MAPS, but for private for-profit development which dramatically differs from The City's alleged intended use.

The January 12, 1999 Development Plan of TMK/Hogan as approved by City Council Resolution (Exhibit **"M"**) clearly shows that the purpose for which The City **now** intends, and presumably has always intended, to use TTI's parcels **is**

different than what The City alleged in its March 24, 1997, Petition for condemnation. As shown by the record, The City constantly claimed it needs TTI's Parcels for public parking, park and public recreational use under MAPS.

Even though The City told this Court that the usage would be for MAPS and use the MAPS money (which restricts property acquired therewith for MAPS-only projects), the parcels were never in the MAPS plans. Instead, the parcels were in a separate development plan for a private developer to buy the parcel and develop them for his own profit and to the detriment of TTI. *See* Affidavits of David R. "Dusty" Martin and Mark Deal.

By virtue of The City transferring the parcels to its agent OCURA and the plans unfolding for those parcels to be, not parking, etc., but stores and businesses that would generate substantial revenue for OCURA's chosen private developer, it can only be presumed that The City always intended, at the time they filed their objections to TTI's Exception to Report (after June 24, 1997), to transfer the land to OCURA for private development by a competitor of TTI and BT 2000 (i.e., TMK/Hogan). The City thereby deceived and misled this Court to believing the TTI parcels were needed for specific public use, as opposed to private development. It should be noted that The City would have no legal authority to condemn the parcels for private for-profit development for which the parcels are not slated. Clearly, The City intended to use these parcel for private use and definitely other than the use alleged in the *Petition* subsequent pleadings.

A similar situation occurred in the case of *Katz, supra,* where the court's decision effectively was that: *Testimony in support of condemnor's eminent domain petition alleging reasonable necessity for taking condemnees' property for public purpose of urban renewal contemplating clearing of a slum area, which asserted that there was slum property in "general area" of*

but ***not including subject property and which asserted different public purpose from that alleged in petition and declaration of taking****, was without evidentiary value.* (Emphasis added).

5. TTI's parcels were never properly included in MAPS plan and so were never subject to eminent domain taking.

In its Petition, The City claimed that TTI's parcels were needed for the MAPS plan. The MAPS Master Plan did include public parking on parcels ADJACENT to TTI's property, but **never** included parking on TTI's parcels. As clearly shown by the MAPS Master Plan design (Exhibit **"B"**, pages 46, 48, 49, 50,51 & 52), and supported by the attached Affidavits of Messrs. Deal and Martin, TTI's parcels were not part of the public use that MAPS needed. Here, The City condemned the property under the pretense of using it for public park, then transfer it to the OCURA who intent to use it under the Urban Renewal Act (i.e., clearing of a slum and blighted area).

Furthermore The City was without legal power to act in this manner since The City used MAPS funds in purchasing the land and under the pretense of necessity for MAPS projects, and neither the MAPS Master Plan nor the MAPS Ordinance includes expenditures to support private development under any Urban Renewal plan.

Here, it is clear that The City told this Court, in its Petition and throughout, that the TTI parcels are needed for MAPS project, and specifically for parking and public recreation, where in truth and in fact, the TTI parcels were neither needed for nor included in the MAPS Master Plan. The only presumption that can be made is that The City intended to use TTI parcels for private development or to trade for other property which does not involve MAPS. It needs to be clarified that MAPS are certain projects and is not synonymous with

Bricktown development. Clearly, The City deceived * and misled the Court by claiming MAPS usage when the usage was Bricktown development. The importance of this is that The City was without legal authority to condemn for Bricktown development or to use MAPS law or MAPS money for non-MAPS projects.

In a hearing on public use versus private use claim, all presumptions are to be taken in favor or the condemnee. *Watkins v. Board of Commissioners of Stephens County,* 1918 OK --, 70 Okla. 305, 174 P. 523. Thus, the presumption here favors TTI and the condemnation orders should be rescinded and the land returned to TTI as there is no plausible explanation other than a taking for private use.

6. Permitting condemnation to stand would violate federal and state constitutions.

If this Court permits the condemnation Orders to stand, then the federal and state constitutional rights of TTI would be infringed.

The Constitutions of both the United States and State of Oklahoma prohibit the taking of private property "for public use" without just compensation. *U.S. Constitution, Amendment 5; Oklahoma Constitution, Article 2, Section 24.* It should be noted that "public use" is required, not private development where a developer profits. Where public use ends or is no longer viable, then the powers are no longer within the constitution rights and property cannot be taken. In fact, the Oklahoma Constitution **absolutely forbids** taking private property for private use absent consent of the owner. *Oklahoma Constitution, Article 2, Section 23.* It should be noted that all constitutional and statutory provisions relating to condemnation are to be strictly construed in favor of condemnee and against condemnor. *Public Service Co. of Oklahoma v. B. Willis, C.P.A., Inc.*, 1997 OK 78, 941 P.2d 995.

The taking of property for a private use under the guise of public use violates due process and is tantamount to legal fraud on property owners, even if there is no intent to deceive. *City of Arlington v. Golddust Twins Realty Corp.*, 41 F.3d 960 (5th Cir. 1994).

As noted above, the actual purpose of the taking here was for a private Bricktown developer, and not the public use identified as MAPS parking, etc. Thus, there is taking for a private purpose, under the disguise of a public purpose, and which is legally impermissible.

The Equal Protection Clause, found in the U.S. Constitution, Amendment 14, mandates equal protection of State law for all citizens. There is no equality where one citizen is financially favored over another by virtue of a municipality using its eminent domain powers. To its very root, The City would be taking property from TTI and selling it to another private person for the latter's profit, thus evading the free enterprise system and rights of property owners. The result would be private developers paying The City to obtain by eminent domain any land the developer would like, but that the owner would not wish to sell or to sell at a reduced price. There is no equality where citizens are unequally treated.

Also, the Due Process Clause, found in the U.S. Constitution, Amendment 14, which prohibits deprivation of property without due process, and the State Constitution, Article 2, Section 7 , both require notice and an opportunity to be fairly heard. There is no fairness where a condemnor deceives and misleads, thereby depriving a land owner from having a fair and full hearing. Effectively, The City could concoct a false 'public need' claim for every valuable piece of real estate and then sell it at a profit or to politically influential people for favors, despite the 'need' being a sham or illusorous.

7. Eminent domain powers do not allow condemnation of property for the very same public purpose as the property was already dedicated.

Even if one assumes, *arguendo*, that The City's Petition properly alleged the taking of the property was for Urban Renewal Economic Development purpose (which it did not), and further assuming, *arguendo*, that no MAPS funds were used to purchase the property, eminent domain law DOES NOT give the power to condemn TTI parcels designated for the very same purpose as stated in the condemnation action. In other words, The City could not take the parcels dedicated for public parking from TTI and claim the need to use them for public parking; otherwise The City could conceivably take any private property, claim a public need, and profit from the private person's development labors.

In *City of Pryor Creek v. Public Service Co.*, 1975 OK 81, 536 P.2d 343, the Oklahoma Supreme Court held:

> "**The general rule is that property already legally appropriated to a public use is not to be afterwards taken my a municipality for a like use** unless the intention of the Legislature that it should be so taken has been manifested in express terms or by necessary implication. *** **To hold otherwise would amount simply to taking property from one and destroying his right to operate although expressly authorized to do so, and giving it to another without any benefit to the public**." (Emphasis added; internal citations omitted).

Pryor, 536 P.2d at 346.

Even more egregious is where, as here, the property is taken from one private entity and to be transferred to another private entity, effectively using eminent domain to profit one entity to the financial detriment of another. But even worse, is the matter here since it is clearly evident by the record that the TMK/Hogan private developer's plan, which was approved by the City Council on January 12, 1999, does not provide any benefit to the public, or to that fact, does not provide any parking as The City claimed was needed. The economic benefits by selling the TTI parcels to TMK/Hogan is plainly to provide/shift profits to one private entity by taking the land of another.

8. Should reconsideration fail, then an injunction is needed and proper.

If this Court denies TTI's modification request, then TTI respectfully urges the Court to prevent further harm to TTI by enjoining The City and its agent, OCURA, from any futher transferring of the parcels, especially to any third party.

Injunction may be used as a provisional remedy. *12 O.S. Sec. 1381.* When it appears that a party will act to render a final judgment concerning property ineffectual, then injunction is an appropriate remedy. *12 O.S. Sec. 1382.*

If an injunction is not entered, then The City or its agent, OCURA, may then try to alienate or transfer away the property so that all TTI could claim is damages for loss of the property if the decisions of this Court were reversed on appeal.

Injunctions have been used in various aspects of condemnation cases. *See e.g. Wright v. State ex rel. Department of Highways,* 1951 OK --, 204 Okla. 380, 230 P.2d 462; *Watkins v. Board of Commissioners of Stephens County,* 1918 OK --, 70 Okla. 305, 174 P. 523.

Since land is unique, TTI has an inadequate remedy at law if the condemnation decisions do not survive appellate review. Therefore, TTI would respectfully urge this court to enter an Order enjoining The City and its agents from any further alienation or transferring the parcels.

WHEREFORE, Defendant TAL TECHNOLOGIES, INC. prays for this Court to enter the appropriate Orders as requested in the alternative herein by either (a) rescinding and withdrawing its Orders granting title, etc. to The City, thus reverting ownership to TTI, or (b) grant the request for a temporary injunction to prevent and prohibit further transfer away from either The City or OCURA (its agent) until this Court's decision can be decided on appeal.

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[filed 9/28/99. Certificate of Service and Exhibits omitted]

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11. TTI's Motion to Reconsider Ruling of October 21, 1999, Denying Defendant's Motion to Reconsider and Modify Orders on the Basis of Error of Law, *The City of Oklahoma City vs. Tal Technologies, Inc., et al.,* District Court of Oklahoma County, Oklahoma - Case No. CJ-97-2034-65 - filed 11/2/99.

IN THE DISTRICT COURT, 7TH JUDICIAL DISTRICT OKLAHOMA COUNTY, STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY a municipal corporation,	)	
Plaintiff,	)	
vs.	)	Case No. **CJ-97-2034-65**
TAL TECHNOLOGIES, INC., an Oklahoma corporation, et al.,	)	
Defendants.	)	

DEFENDANT TAL TECHNOLOGIES, INC.'S MOTION TO RECONSIDER RULING OF OCTOBER 21, 1999, DENYING DEFENDANT'S MOTION TO RECONSIDER AND MODIFY ORDERS ON THE BASIS OF ERROR OF LAW

COMES NOW Defendant TAL TECHNOLOGIES, INC. (TTI) and seeks this Court to reconsider its ruling made October 21, 1999, denying this Defendant's Motion to Reconsider filed September 28, 1999, for the reason that Plaintiff THE CITY OF OKLAHOMA CITY (The City) presented in oral argument a misrepresentation of law to this Court and which served as the basis for this Court's erroneous ruling. The City confessed all aspects of TTI's September 28, 1999, Motion.

In oral argument on the Motion held October 21, 1999, The City misled this Court in several respects. First, The City termed Defendant's Motion "frivolous" because, City claims, the award was paid out based upon the motion of the County Treasurer of Oklahoma County, and Defendant TTI's acceptance of that award bars a present contest to the condemnation itself. Second, The City equated TTI's receipt of the money as "acceptance" which bars reconsideration and any appeal at this late date. The City's oral assertion of

"frivolous" is so far removed from the actual Oklahoma case law on this point, that such comment reflects the utter lack of a justifiable position of The City.

It should be repeated that TTI has always and continues to contest the alleged need claimed by The City; there has been no abandonment of that position. *See Answer filed April 14, 1997; Exceptions to Report filed June 30, 1997; Defendant's Response filed August 22, 1997.* The parcels of TTI were never within MAPS nor apparently intended for anything to do with MAPS, a clear fraud when The City asserts to this Court that MAPS is the basis.

It also bears repeating that Defendant TTI **did not** ask for the award to be paid out, but merely received the award based upon the motion of the County Treasurer. *See Exhibits "A", "B", "C" and "D" hereto.*

This Honorable Court mistakenly ruled on erroneous law that condemnee's (Defendant TTI's) receipt of the award was fatal to the continued contest of the condemnation order. The City cited orally one case, but whatever case was cited is not the law in Oklahoma as shown herein. Defendant TTI presents the following case law in an attempt to allow this Honorable Court to correct its erroneous decision.

In *Grand River Dam Authority v. Eaton,* 1990 OK 133, 803 P.2d 705, receipt of a commissioner's award and payment of a judgment in a condemnation case was held not to foreclose the right to appeal as the payment of the money was not with intent to compromise or settle the matter. This corresponds to Defendant TTI's position that receipt of the commissioner's award does not prevent the continued contest as to the necessity of the taking since the receipt of that award was not at the request of the condemnee (Defendant TTI) nor ever intended to waive that contest.

In *Jerry Scott Drilling Co., Inc. v. Scott,* 1989 OK 131, 781 P.2d 826, the Oklahoma Supreme Court held that the condemnation order itself is not a final appealable order where there exists a timely demand for jury trial on value. This aligns with Defendant TTI's position in its Reply filed October 15, 1999. Accordingly, the condemnation order is merely interlocutory (*see i.d.* para. 1 where the Court stated: "We have determined the order [which confirmed a report of appraisers] was interlocutory in nature rather than final . . . .")

Next, in *McMillian v. Holcomb,* 1995 OK 117, 907 P.2d 1034, the issue concerning a condemnee receiving the commissioner's award was discussed as it pertains to the effect of appealing the condemnation decision (not the value itself). The Court is directed to paragraphs 14 through 17 of the *McMillian* decision where, in plain and simple terms, the Oklahoma Supreme Court decided that, so long as the condemnee did not ask for the money, i.e. make an application for payment of the money deposited, the condemnee's receipt of that money does not bar condemnee's contest of the decision to condemn. As the Oklahoma Supreme Court stated, a condemnee should not be penalized when condemnee did not make an application for payment. Receipt of the award means nothing as to condemnee's right to contest the condemnation.

In the present case, it is very clear that Defendant TTI did not make an application for payment. The City did not contest the pay out and has not sought an order to require Defendant to pay the amount disbursed back to the District Court. Therefore, the receipt by TTI of the award from the Court Clerk is irrelevant and inconsequential. Again, this is consistent with TTI's Motion and Reply filed in September and October with this Court. It is also consistent with the statutory law on appeals from condemnation cases and those cases which hold decisions during the condemnation proceeding as interlocutory and not appealable. *See 66 O.S. Sec. 56; Wrightsman v. Southwestern Natural Gas Co.,* 173 Okla. 75, 46 P.2d 925

(1935); *Eufaula v. Ahrens,* 58 Okla. 180, 159 P. 328 (1916).

Since this Honorable Court clearly erred in basing its decision on the award being paid out to TTI (a proposition the law shows to be wrong in contravention of The City's Response), that decision should be rescinded in the interest of justice and the Defendant's Motion to Reconsider heard on its merits and a decision made accordingly on the propositions stated therein..

WHEREFORE, Defendant TAL TECHNOLOGIES, INC. prays for this Court to enter the appropriate Orders as requested by rescinding the decision entered on October 21, 1999, and then reconsidering all relief requested in the September 28, 1999, Motion filed by Defendant TTI seeking reconsideration of the order approving the inappropriate condemnation.

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[Filed 11/2/99 - Exhibits and Certificate of mailing omitted]

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12. Exhibit "C" (Issued to be Raised on Appeal)- to *TTI's Petition In Error - The City of Oklahoma City v. Tal Technologies, Inc, et al,* In the Supreme Court of the State of Oklahoma, case No. 94,045, filed12/15/99.

EXHIBIT "C" — ISSUES TO BE RAISED ON APPEAL

1. Did the trial court error in refusing condemnee's challenge to necessity and propriety of taking after condemnee had received the Commissioner's Award by virtue of a motion and order to disburse award sought by a co-defendant and where plaintiff/condemnor did not object to receipt of the award?

2. Did the trial court error in not holding City/condemnor's Resolution improper and invalid as an attempted condemnation of land for a specified use where that very land has already been dedicated for that same use by the condemnee/land owner?

3. Did the trial court error by denying that City/condemnor deceived and defrauded the court by claiming MAPS usage for a property which was (a) never included in the MAPS project, (b) has never subsequently been included in the MAPS project, and (c) is being transferred over to another private developer for profit use who is a competitor with condemnee/land owner?

4. Where City/condemnor condemns property allegedly for public parking under MAPS, and then seeks to transfer that condemned property to a private developer, a competitor of the condemnee/land owner, for development as a private restaurant and private retail shops to profit transferee, is such an illegal and fraudulent taking under the eminent domain-powers of a City?

5. Does condemning private property for an alleged public use which turns out to be in actuality for the private use of a competing developer of condemnee/land owner, violate federal constitutional requirements of taking for a public purpose?

6. Does condemnation by a City of private property for an

alleged public purpose which turns out in actuality to be for the private development of a competitor of condemnee/land owner violate state constitutional prohibitions of taking private property for private use?

7. Does a City have the power to condemn property for an alleged use despite the property being dedicated by the condemnee/land owner for the very same use and purpose as the City alleges in its condemnation petition?

8. Did the trial court error in failing to grant an injunction prohibiting further transfer of condemned property to a private developer where condemnee/land owner challenged the taking under claims of fraud, illegality and unconstitutionality of the taking?

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13. TTI's *Brief In Chief, The City of Oklahoma City v. Tal Technologies, Inc, et al,* In the Supreme Court of the State of Oklahoma, case No. 94,045, filed 8/18/00.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY, a municipal corporation,	)	
Plaintiff/Appellee,	)	
vs.	)	**Case No. 94,045**
TAL TECHNOLOGIES, INC., an Oklahoma corporation,	)	
Defendant/Appellant,	)	

and	)
	)
BANK ONE, OKLAHOMA CITY, and	)
FORREST "BUTCH" FREEMAN, as	)
Treasurer of Oklahoma County,	)
Oklahoma, and SHIRLEY DARRELL,	)
EARL ROOMS, and STUART	)
EARNEST, SR., as Board of County	)
Commissioners of Oklahoma	)
County, Oklahoma, and L.D.	)
RHODES OIL CO., an Oklahoma	)
corporation and L.D. RHODES, an	)
individual,	)
	)
Defendants.	)

BRIEF IN CHIEF OF APPELLANT TAL TECHNOLOGIES, INC.

COMES NOW appellant TAL TECHNOLOGIES, INC. (TTI) and respectfully submits this BRIEF IN CHIEF to reverse decisions of the Trial Court favoring appellee THE CITY OF OKLAHOMA CITY (The City).

This appeal concerns The City's abuse of its power of eminent domain. Under the pretense of "public use", The City used deception and fraud to justify condemning TTI's prime, canal-front property. In actuality, TTI's property was condemned for the purpose of transferring it to another private entity (TMK/Hogan), a competitor of TTI, for private development and economic gain, and not for the public use alleged to the Trial Court. This condemnation is simply a direct violation of TTI's constitutional and inalienable right to own and enjoy its property.

SUMMARY OF THE RECORD

TTI owned two parcels of land adjacent to the Bricktown Area of Oklahoma City. These two parcels have been designated as Parcels Nos. 8016 & 8019 in this litigation ("the parcels" or "the Property"). *R. 1-13.*

TTI planned to dedicate the parcels to public use through an agreement with developer, BRICKTOWN 2000, INC. (BT 2000). BT 2000 presented a proposal to The City for dedication of the Property for public parking and retail development along the canal. After TTI made its designation and proposal, The City decided to condemn the parcels under its municipal powers of eminent domain. Despite TTI's pending proposal to dedicate the property for public parking, The City alleged that the parcels were needed for parking, public recreation and parks associated with its Metropolitan Area Projects development plans (called "MAPS"). *R. 350-355.*

TTI filed timely exceptions to the Commissioners' Report, challenging, *inter alia*, the necessity of the taking. *R. 23-24.* The Trial Court entered Orders granting The City its condemnation request, based upon its claim of public need. *R. 306-313 & 329-337 & 338-343.*

The case has been set for jury trial on the issue of value of the parcels. *R. 21-22 & 25-27.* Trial on the valuation issue awaits this appeal since a decision of this Court may eliminate the need for a costly trial on the true value of the parcels.

TTI has discovered during the pendency of this case and has noted to the Trial Court: (a) condemnation is improper where the alleged public purpose was already the planned use of the land; (b) it has discovered that the parcels were never part of the MAPS plan and thus the claim of need for MAPS is false and deceived the Court; (c) the parcels were, almost immediately after and since the Court's Orders, transferred by The City to its agent, the Oklahoma City Urban Renewal Authority (OCURA), for the purpose of selling the parcels to a

private developer who will use the property, not for parking, public park or any public recreation (i.e., any public use), as The City told the Trial Court, but for-profit restaurants and retail shops with some private pay parking. *R. 350-355.*

TTI filed a Motion in the Trial Court seeking reconsideration and withdrawal of the Orders and restoration of the parcels to TTI as the alleged reasons by The City were false and deceptive, and that condemnation was improper under facts and law. *R. 350-455.* In its Motion to reconsider, TTI alleged, with evidentiary support cited within and attached to the Motion, the following facts:

1. On October 13, 1993, the Council of The City of Oklahoma City ("The City") passed a Resolution to seek the voters' approval of an Ordinance for the Metropolitan Area Projects plan (called "MAPS"). MAPS provided specifically for the construction of dams along the North Canadian River with recreation areas, a canal, and public parking facilities; construction of a metropolitan learning center; construction of a baseball stadium; improvement of the Myriad Convention Center; improvement of the Civic Center Music Hall; improvement to the Fairgrounds; construction of a sport arena; and other supplemental projects (transportation links, etc.), all to be financed by a limited five (5) years public sales tax increase of one percent (1%). On December 14, 1993, the citizen voted in favor of MAPS.

2. After the MAPS ordinance was adopted, a Master Plan was created to specify exactly how the public funds would be spent in compliance with the MAPS Ordinance. The Master Plan provided for parking, but DID NOT INCLUDE the parcels at issue here, specifically Parcels Nos. 8016 and 8019 (which were owned by Defendant TTI). All shows the public parking lots to be adjacent and west of TTI's Parcels 8016 & 8019.

3. Defendant, Tal Technologies Inc. ("TTI"), through its president Moshe Tal ("Tal"), entered into a lease and promised to dedicate Parcels Nos. 8016 & 8019 for public parking and retail development along the canal. Tal created a plan to develop part of the adjacent area designated for MAPS projects, and added his corporation's land as an incentive, which parking would be not just a surface lot (as had been designed by MAPS coordinators), but an actual parking garage to provide more than adequate parking spaces for the current projects and future expansion.

4. On March 25, 1997, about two years AFTER Tal notified the City of his corporation dedication, The City filed the present action under its eminent domain powers to condemn the very land which TTI, via BT 2000, had already dedicated for public parking.

5. The City's Petition for condemnation advises this Court that The City seeks Parcels Nos. 8016 & 8019 by "*a fee simple title ...[for] public MAPS facilities*".

6. The City's Petition for condemnation further advises this Court that ... "*Petitioner needs the said property* [Parcels Nos. 8016 & 8019] *for public park, parking, recreational and MAPS facilities.*" The Petition gives no additional detail or plans beyond the extremely vague description.

7. The City's Petition attached the underlying City Resolution for condemnation declaring that the parcels here are needed "*for the purpose of the MAPS Infrastructure/Parking.*" Again, however, the MAPS Plan DID NOT include Parcels Nos. 8016 & 8019, nor does the Petition or City Resolution provide any details as to why these parcels are needed or how they come within the MAPS project (other than they are located in Oklahoma City proper or along the Canal -

just like other Bricktown properties).

8. On June 24, 1997, The City passed a Resolution designating the area south of Reno and north of I-40 (including TTI's property) as sports and entertainment district along the line of BT2000 and Tal's proposal (i.e., parking, and entertainment/retail). The City appointed the Oklahoma City Urban Renewal Authority ("OCURA") to act as its agent in soliciting development proposals. BT 2000 was invited and submitted it proposal. *See BT 2000 July 17, 1997 Proposal* - see the lengthy Exhibit attached to Tal's Affidavit filed August 28, 1997. BT 2000 included Parcels 8016 & 8019 for retail development along the canal and supportive/public parking behind. But is should be noted that this is a separate development and not "MAPS." [Note — the proposal was originally presented by TTI to The City in June of 1995 as per Exhibits E, F, G and J to TTI's Motion to Reconsider, *R. 350-455.*]

9. On July 28, 1997, the OCURA conditionally designated TMK/Hogan for Phase I development of parking and entertainment, and BT2000 for Phase II development along the eastern parcels of OCURA. The TMK/Hogan (and its affiliated BPI) parking plan DID NOT INCLUDE any parking on Parcels 8016 or 8019. [See Exhibit K to Motion to Reconsider, *R. 350-455.*]

10. The Trial Court entered two separate Orders of condemnation, the first only permitting The City to lease the land and the later one allowing The City to transfer the land.

11. Within s short from the Trial Court's October 17, 1997, Order of condemnation, The City, by Resolution dated November 4, 1997, deeded property, including Parcels 8016 & 8019 to the ("OCURA"), an entity not associated with the MAPS project, and an entity that by

law and agreement, acts as The City's agent. In essence, The City took property under the disguise of MAPS which was never included in MAPS and then transferred the property acquired with MAPS tax money to another agency which had no involvement with MAPS. The City's Resolutions of June 24, 1997 and November 4, 1997 effectively modified the voted December 14, 1993, Ordinance WITHOUT submitting said modifications to the voters.

12. On May 20, 1998 (almost one year after the original designation of OCURA), the OCURA and The City decided to cancel BT 2000's designation and gave the entire development rights to TMK/Hogan.

13. On July 21, 1998, the City Council passed a Resolution approving the OCURA designation of TMK/Hogan for a development of the area south of Reno for a multi-screen and IMAX theater (the "cinema complex"), as well as public parking. In its presentation to City Council, TMK/Hogan stated that they need the entire 30 acres (including Parcels Nos. 8016 & 8019) for the cinema complex and public parking.

14. It has recently come to light that the specific development plan of the developer, TMK/Hogan, which has been approved to develop land from the OCURA, including TTI's land, designated Parcels Nos. 8016 & 8019 as, not public parking, public recreation or park, nor for the cinema complex site, but rather for restaurant, retail shops and some parking to support those endeavors.

15. The record also shows that The City and OCURA has modified the location of the MAPS public parking by splitting it into two lots - one lot further west of TTI's parcels (approximately 1,000 feet away), and the

second parking lot further east of TTI's parcels (and on the north side of the canal). Thus, the modified MAPS parking lots are not even adjacent to TTI's property anymore.

16. TMK/Hogan has stated to the Oklahoma Supreme Court in a brief filed September 23, 1999, that the intention for the area of TTI's Parcels Nos. [8016 & 8019] is planned for "retail, restaurant and entertainment venue" with parking now planned well North of the area. *See* Suggestion and Brief of TMK/Hogan in *The City of Oklahoma City vs. The Oklahoma Urban Renewal Authority, et al., Okla. Sup. Ct. No. 92,874,* at pp. 2-3.

17. It is now self-evident that TTI's parcels were never intended for MAPS, but that MAPS was used as an excuse to condemn the land which would then be transferred to a city agency and then sold to a private developer, who will then handsomely profit from developing the land while providing no public parking, public park or MAPS infrastructure.

18. Also, The City illegally condemned property alleging the very same purpose for which the property was designated, i.e., public parking, and then never used the property for the purpose it claimed.

19. Furthermore, The City, via its agent OCURA, will effectively transfer the parcels in dispute here to a competitor of BT 2000, thereby using public funds, law and money to rob one private entity of its valuable property and then sell (at a reduced price) that valuable property to another private entity which will profit therefrom. In essence, The City uses its powers and public tax dollars to provide profit to a private entity at the expense of another private entity.

20. The manner and method used by The City in condemning TTI's land is clearly an abuse of its eminent domain powers, bad faith and by fraudulent activities.

The City did not contest or chalienge the factual statements contained in TTI's Motion. *R. 456-471.* The lack of challenge from The City, which is likely due to the proof proffered with the Motion by TTI, should equate to a concession by The City that those facts are indeed accurate.

At the hearing on TTI's motion, the Trial Court voiced concern over TTI's receipt of the funds deposited with the Court Clerk. The Court denied the Motion seeking reconsideration of the award of the parcels. *R. 543-545.* Due to the Court's vocal concern about the withdrawal of funds, TTI's next Motion addressed the Court's denial of the reconsideration motion and specifically noted the law permitting withdrawal of the award funds without prejudice to challenging the taking. *R. 484-493.* The Court also denied this motion. *R. 546-548.* This appeal was then commenced as relief in the Trial Court would obviously never be obtained by TTI.

ARGUMENT AND AUTHORITIES OF LAW

PROPOSITION I: TRIAL COURT ERRED IN FAILING TO INVALIDATE IMPROPER CONDEMNATION OF LAND FOR A SPECIFIC USE BY VIRTUE OF LAND BEING DEDICATED FOR AN IDENTICAL USE BY CONDEMNEE.

In all of its condemnation pleadings and proceedings The City adamantly contended that it needed TTI's parcels for public parking, park and public recreational use. *See R. 1-13, City's Petition*, page 3, *City's 2/4/97 Resolution*, page 1, and *R. 28-90,* City's July 24, 1997 *Motion to Overrule Defendant's*

Exception to Report ..., pp. 3-4. No other need or allegation as to purpose for the condemnation was ever pled, or even implied, in any pleading or proceeding.

While it is true that the introduction of the City Council Resolution for necessity makes a *prima facie* showing of necessity, it is not conclusive proof in and of itself in the face of evidence to the contrary. For example, in *Katz v. Dade County*, 367 So.2d 277 (Fla. App. 1979), the burden to show the necessity of the condemnation remained with the condemnor where the condemnee presented evidence of no reasonable necessity. The court there held that where such evidence existed, the court could not simply rely upon the condemnor's claim of necessity. Similarly, in *Missoula v. Mountain Water Co.*, 228 Mont. 404, 743 P.2d 590 (1987), the court there declared that the expressed need by a city was but one factor only in considering a challenge to the claimed necessity, and not self-determinative.

This Court is urged to follow these protocols and not permit an irrebuttable presumption of necessity merely because The City happens to plead such, and especially in light of the proof that no real necessity exists in this matter. The City here has failed to show a reasonable necessity for the taking, in order to serve the public purpose it asserted for the condemnation. Meanwhile, TTI has shown the condemnation as unnecessary due to identical use dedication and The City's abandonment or lack of intention to use the parcels for public use, i.e., parking for MAPS projects.

A. No Necessity Exists Where the Property is Already Being Used for the Use Planned by the Condemnor.

The City's power to condemn is limited insofar as it cannot condemn property for a particular purpose when the property is already being used for that identical purpose. In other

words, it is not necessary to take the property for a particular use when the property is already being put to that very same use. Neither The City's Resolution nor its City Charter authorizes a city the power to "overrule" restrictions in place under State eminent domain law. In *City of Pryor Creek v. Public Service Co.*, 1975 OK 81, 536 P.2d 343, the Oklahoma Supreme Court held:

> The [Oklahoma] Constitution and general laws of state-wide concern control over conflicting city charters. The power of eminent domain is of state-wide interest and importance. **This right cannot be extended and expanded by provisions of the city charter**. (Emphasis and brackets added.)

Id., at 346. This Court further stated:

> An examination of the Constitution and statutes of the State of Oklahoma discloses that **authority has not been granted to a municipal corporation to take**, either expressly or by implication, under the power of eminent domain, **property already devoted to the same public use for which the municipality seeks to condemn it**. (Emphasis added).

Id., at 347. *See also Oklahoma City v. Local Federal Savings & Loan Ass'n*, 1943 OK 42, 134 P.2d 565, 575 (forbidding taking of property under alleged public use where the property is already designated for public use); and *Marsh Mining Co. v. Inland Empire Min. & Mill. Co.*, 30 Idaho 1, 165 P.1128 (1916) (property cannot be condemned for same public use for which it is already being used, or for which use it is in good faith being held). Therefore, the City Council's Resolution attached to the City's Petition for condemnation in this cause of action, is insufficient or improper under law, since it attempts to extend and expand beyond the perimeters of the powers given

by the Legislature and by the Oklahoma Constitution via the City's desired condemnation of land for the very same use it was dedicated, i.e., to be used, by TTI. Furthermore, the alleged *prima facie* case made by incorporating The City's invalid Resolution finding necessity must fail as the Resolution attempts to accomplish that which The City cannot undertake by law.

Even if one assumes, *arguendo*, that The City's Petition was broad enough to allege the taking of the property for Urban Renewal Economic Development purpose, and further assuming, *arguendo*, that no MAPS funds were used to purchase the property, eminent domain law still does not give the power to condemn TTI parcels designated for the very same purpose as stated in the condemnation action. In other words, The City could not take the parcels dedicated for public parking from TTI and claim the need to use them for public parking; otherwise The City could conceivably take any private property, claim a public need, and profit from the private person's development labors.

In *City of Pryor Creek v. Public Service Co., supra*, this Court held:

> **The general rule is that property already legally appropriated to a public use is not to be afterwards taken by a municipality for a like use** unless the intention of the Legislature that it should be so taken has been manifested in express terms or by necessary implication. *** **To hold otherwise would amount simply to taking property from one and destroying his right to operate although expressly authorized to do so, and giving it to another without any benefit to the public**.

Id., at 346 (emphasis added; internal citations omitted)..

The City's claim of necessity via its own self-serving resolutions should not be taken as the absolute truth on the issue and must be subject to be proven since TTI here contests the allegation of necessity. As the uncontroverted evidence herein defies proof of a necessity, then the Trial Court's decision should be reversed and the parcels ordered returned to TTI. Furthermore, the condemnation for an identical use as already existing for the property establishes that no need exists to condemn the property. The Trial Court should thus have denied the condemnation under law initially or, at the very least, set aside the transfer upon the motion by TTI. This Court is urged to correct these errors and reverse the Trial Court's decisions.

B. The City Cannot Show the Taking is Necessary and Condemn Private Property for the Purpose of Transferring the Property to Another Private Party for Private Use.

Even more egregious is where, as here, the property is taken from one private entity and to be transferred to another private entity, effectively using eminent domain to profit one entity to the financial detriment of another. As set forth in Propositions III and IV below, the real reason behind the taking was not for some public use, but instead as an apparent subterfuge to obtain the lands and then transfer them to a private developer for private development. Thus, the claim of public use is and was simply an illusion as a basis to condemn the property and then use it for a purpose under which The City could not have condemned it under State law. Since The City admitted these very contentions as set forth in the Motion to Reconsider, and which are repeated in the Statement of the Record, above, there can be no doubt of the ulterior purpose for condemnation.

PROPOSITION II: VIOLATIONS OF FEDERAL AND STATE CONSTITUTIONS E X I S T W H E R E CONDEMNATION INVOLVES TAKING PRIVATE LAND FOR A PRIVATE PURPOSE.

If this Court permits the condemnation Orders to stand, then the federal and state constitutional rights of TTI would clearly be infringed.

The Constitutions of both the United States and State of Oklahoma prohibit the taking of private property "for public use" without just compensation. *U.S. Constitution, Amendment 5; Oklahoma Constitution, Article 2, § 24.* It is axiomatic under the Federal Constitution that government cannot use the eminent domain powers to condemn property for the private use and benefit of another. *Missouri Pacific Ry. Co. v. State of Nebraska,* 164 U.S. 403, 17 S.Ct. 130, 41 L.Ed. 489 (1896) (action would violate the 14th Amendment to U.S. Constitution). *See also Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*,304 Ill.App.3d 542, 238 Ill.Dec.99, 710 N.E.2d 896 (1999) *leave to appeal allowed* 185 Ill.2d 667, 242 Ill.Dec. 151, 720 N.E.2d 1106.

It should be recognized that "public use" is required, not private development where a private developer profits. Where public use ends or is no longer viable, then the powers are no longer within the constitutional rights and property cannot be taken. In fact, the Oklahoma Constitution **absolutely forbids** taking private property for private use absent consent of the owner. *Oklahoma Constitution, Article 2, § 23.* It should be noted that all constitutional and statutory provisions relating to condemnation are to be strictly construed in favor of condemnee and against condemnor. *Public Service Co. of Oklahoma v. B. Willis, C.P.A., Inc.*, 1997 OK 78, 941 P.2d 995.

The taking of property for a private use under the guise of

public use violates due process and is tantamount to legal fraud on property owners, even if there is no intent to deceive. *City of Arlington v. Golddust Twins Realty Corp.*, 41 F.3d 960 (5th Cir. 1994).

As admitted by The City, TTI's property was condemned with the intent to transfer it, through its agent OCURA, to TMK/Hogan for the purpose of using the Property for numerous retail outlets and parking to support TMK/Hogan's private retail development. Thus, there is a taking for a private purpose, under the disguise of a public purpose, which is legally impermissible as a due process violation.

Similar circumstances existed in the case of *Southwestern Illinois Development Authority v. National City Environmental, LLC, supra.* In that case, the Southwestern Illinois Development Authority ("SWIDA")[1] condemned National City Environmental's ("NCE") land for the purpose of conveying said land to an operator of an automobile racetrack located on adjacent property in order to allow the racetrack to expend its parking lot. The court record shows that the racetrack had sufficient property to build a parking garage, but content that it would be cheaper to build a surface parking lot on NCE's property than the cost of building a parking structure. The Illinois Development Authority cited numerous examples which they claimed gives them the power to condemn NCE's property as a 'public purpose.' In reply, the Illinois Court of Appeals stated:

> As disparate as these purposes are, it should be noted that **none of them involve the taking of property from one private party and the immediate transfer of it to another private**

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[1]. An entity similar to the Oklahoma City Urban Renewal Authority.

party, whose interest in the property is solely to earn greater profits.

Id., at 901 (emphasis added). The court went on to say:

> Eminent domain is an intrusive power, and the potential for its abuse is boundless. It is the function of the courts to give effect to the constitutions. It is the courts' duty to enforce the constitutional limitation against taking private property by eminent domain except for public purposes.

Id., at 904.

In a specially concurring opinion, Justice Kuehn so eloquently stated:

> Nonetheless, its answer seems simple enough. **If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain. If a government agency can decide property ownership solely upon its view of who would put that property to more productive or attractive use, the inalienable right to own and enjoy property to the exclusion of others will pass to a privileged few who constitute society's elite. The rich may not inherit the earth, but they most assuredly will inherit the means to acquire any part of it they desire.**
>
> The attraction of private venture capital is a worthy public goal, and the legislature provided SWIDA with numerous ways to accomplish it. While this legislation

offers unquestionable potential for the kind of social and economic advancement that follows capital investment, **it exceeds sacred parameters when it empowers SWIDA to lure private investors with the promise of any prime land those investors want to take**.

This part of SWIDA's statutory power offers dubious progress. It is, after all, akin to the tyranny our forefathers fled. Our heritage stems in part from the aversion to the King's use of property to convey favor upon a privileged nobility. It betrays that heritage to rekindle the practice.

Article 1, section 15, of the **Illinois Constitution forbids eminent domain's exercise for private use**. (Emphasis added)

Id., at 906, Kuehn, J., specially concurring.

In summary, the Illinois Appellate Court held that the taking of land for the development and use by a private racetrack owner, even for parking, did not qualify as a public use in order to justify the imposition of eminent domain upon an unwilling seller. In addition, that Court noted that urban renewal doctrines were inapplicable since the matter was not prosecuted under that State's urban renewal condemnation laws, *id.*, at 904, which mirrors the situation here.

The City here is using eminent domain to profit one entity to the financial detriment of another. The record here reveals that the TMK/Hogan private developer's plan, which was approved by the City Council on January 12, 1999, does not provide any benefit to the public, or to that fact, does not provide any parking as The City claimed was needed. The economic benefit of selling the TTI parcels to TMK/Hogan is plainly to provide/shift profits to one private entity by taking

the land of another. ere, even if assuming that the transfer of properties adjacent to TTI's property to the OCURA and then to TMK/Hogan were legal, TMK/Hogan would have sufficient space and could convert the west surface parking lot to a parking garage (similar to CCBT's 7/17/97 proposal).

As noted above, the actual purpose of the taking here was apparently for a private Bricktown developer, and not the public use identified as 'MAPS parking, etc.' Thus, there is taking for a private purpose, under the disguise of a public purpose, and which is legally impermissible.

In addition, the Equal Protection Clause, found in the U.S. Constitution, Amendment 14, mandates equal protection of State law for all citizens. There is no equality where one citizen is financially favored over another by virtue of a municipality using its eminent domain powers. To its very root, The City would be taking property from TTI and selling it to another private person for the latter's profit, thus evading the free enterprise system and rights of property owners. The result would be private developers paying The City to obtain by eminent domain any land the developer would like, but that the owner would not wish to sell or to sell at a reduced price. There is no equality where citizens are unequally treated.

Furthermore, the Due Process Clause, found in the U.S. Constitution, Amendment 14, which prohibits deprivation of property without due process, and the State Constitution, Article 2, § 7, both require notice and an opportunity to be fairly heard. There is no fairness where a condemnor deceives and misleads, thereby depriving a land owner from having a fair and full hearing. The true purpose behind the condemnation did not become readily visible until The City took and then almost immediately transferred the parcels to another agency for sale to a private developer at a ridiculously inadequate value. Effectively, The City could concoct a false 'public need' claim for every valuable piece of real estate and

then sell it at a profit or to politically influential people for favors, despite the 'need' being a sham or an illusion. The Trial Court, faced with the uncontroverted facts as placed in TTI's motion, should have set aside the transfer of the parcels. This Court is asked to correct those errors and reverse the transfer of the parcels.

The City certainly knew it had no power to condemn TTI's Property (and other adjacent properties) and convey that Property to TMK/Hogan for a private development to profit TMK/Hogan. The City apparently took several steps to simply by-pass the legal obstacles. It condemned under the pretense of public need, alleging a very broad purpose but apparently neglecting to alter its MAPS plan to coincide with its allegation. It passed a resolution to transfer the properties to the OCURA, which had the authority to condemn private land and transfer the same to a private developer but did not join in nor exercise any such authority. It never claimed that TTI's property was needed for an urban renewal economic development project, and could never have justified such a claim anyway under law (TTI's prime, canal front property could never qualify as a 'slum' or 'blighted' property under that law). These actions reflect that the constitutional rights of TTI were being trampled upon by The City in an attempt to obtain the Property and justify the taking.

PROPOSITION III: TRIAL COURT ERRED IN REFUSING TO SET ASIDE CONDEMNATION WHERE EVIDENCE EXISTS THAT THE CITY DECEIVED AND DEFRAUDED THE COURT BY CLAIMING MAPS USAGE WHERE PROPERTY WAS NEVER INCLUDED IN MAPS, BUT WAS ONLY INCLUDED IN A PROFIT MAKING DEVELOPMENT DIFFERENT FROM THE CITY'S CLAIMS IN ITS CONDEMNATION PETITION.

The January 12, 1999 Development Plan of TMK/Hogan as approved by City Council Resolution (*R. 350-455,* Exhibit

"M") clearly shows that the purpose for which The City intends, and presumably has always intended, to use TTI's parcels **is different** than what The City alleged in its March 24, 1997, Petition for condemnation. *Compare R. 1-13.* As shown by the record, The City constantly claims in this case that it needs TTI's parcels for public parking, park and public recreational use under MAPS. Yet, even though The City told the Trial Court that the usage would be for MAPS and use the MAPS money (which restricts property acquired therewith for MAPS-only projects), the parcels were never in the MAPS plans. Instead, the parcels were in a separate development plan for a private developer to buy the parcels and develop them for his own profit and to the financial detriment of TTI. *See R. 350-455,* Affidavits of David R. "Dusty" Martin and Mark Deal attached to Motion.[2]

A simple allegation of necessity would have sufficed except for the presence of fraud, bad faith or abuse of discretion. *McCrady v. Western Farmers Electric Cooperative,* 1958 OK 43, ¶ 3, 323 P.2d 356. Since these problems are present in this case, necessity must then be more clearly delineated. Certainly, TTI must be able to expect and rely upon allegations of necessity pled by The City as being their true reason for condemning the property; otherwise the allegation of necessity is suspect and, as occurred here, the landowner is hampered from determining if a public use is intended. The evidence here, as uncovered by TTI, reveals not a public use, but a

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[2] It should be noted that the Commissioners valued the property at 89¢ per square foot. OCURA, after receiving the parcels from The City for no payment, agreed to sell the parcels to the competing developer for $2.75 per square foot. Yet, property in this area is selling on the market for about $100.00 per square foot. The loss to TTI is, thus, enormous in financial scope and no development has yet occurred on the parcels.

private business venture. Thus, the plea of The City can only be characterized as false (fraudulent) and made in bad faith.

The municipality's right to condemn is limited by law. *See 11 O.S. § 22-104.* Condemnation proceedings, being special proceedings, must closely follow the legislatively proscribed procedures. *Board of County Com'rs of Creek County v. Casteel,* 1974 OK 31, 522 P.2d 608.

By virtue of The City immediately transferring the parcels to its agent OCURA and the plans unfolding for those parcels to be, not parking *et cetera*, but stores and businesses that would generate substantial revenue for OCURA's chosen private developer, it can only be concluded that The City always intended, at the time they filed their objections to TTI's Exception to Report (after June 24, 1997), to transfer the land to OCURA for private development by a competitor of TTI and BT 2000 (i.e., TMK/Hogan).[3] Thus, public use is suspect and The City clearly deceived and misled the Trial Court into believing the TTI parcels were needed for a specific public use, as opposed to some private developer's profit-making venture.

In *Mayor and City Council of Baltimore v. Chertkof,* 293 Md. 32, 441 A.2d 1044 (1982), the Appeals Court there refused to endorse the validity of a condemnation enacted under an ordinance purporting one purpose, when, in fact, the underlying reason was another purpose which could not be reached under the city's eminent domain powers. Likewise, here, The City pleads one purpose when, in fact, another

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[3] The City did not condemn under a claim of an 'Urban Renewal Project'; all pleadings claim a MAPS project. OCURA was not a named party to this action. Furthermore, condemnation was not made, and could not be made under the circumstances existing here, under *11 O.S. § 38-101, et seq.*

motive obviously existed for the condemnation; such condemnation should not be permitted to occur.

The City has no legal authority to condemn the parcels for private profit-making development especially where the parcels are not identified as slated in a private development scheme. Public use is a requirement for condemnation. *11 O.S. § 22-105.*

It is very clear here that both The City's condemnation Resolution and The City's 6/24/97 Resolution adopting the *MAPS Sport-Entertainment-Parking Support Redevelopment Plan* were simply a pretext to condemn TTI's property for the economic enhancement of another developer. By doing so, the condemnation falls outside the public use qualifications. *See Mayor and City Council of Baltimore v. Chertkof*, 293 Md. 32, 441 A.2d 1044 (1982). This is not a condemnation for public use, but rather, it is a forced sale of TTI's prime canal-front property (worth million of dollars) to a competing developer at a very reduced rate ($50,000). Forced sales are illegal. *Prince George's County v. Collington Crossroads, Inc.*, 275 Md. 171, 339 A.2d 278, at 287 (1975).

At least two courts have held that where the predominant purpose of effect of a particular condemnation is for private benefit or interests, then the taking is not for a public purpose. *See Prince George's Co. v. Collington, supra*; *Southwestern Illinois Development Authority v. National City Environmental, L.L.C., supra.*

Clearly, The City intended to transfer these parcels for private use, which is definitely different from the public use alleged in the Petition and its subsequent pleadings. Therefore, the Trial Court should have either denied the transfer initially or vacated the decision upon TTI's motions. This Court is urged to reverse these erroneous decisions.

PROPOSITION IV: CONDEMNEE'S PARCELS WERE

NEVER PART OF THE CITY'S MAPS DEVELOPMENT PLANS AND SO WERE NEVER PROPERLY OBJECTS OF EMINENT DOMAIN.

In its Petition, The City claimed that TTI's parcels were needed for the MAPS plan. The MAPS Master Plan did include public parking on parcels adjacent to TTI's property, but **never** included parking on TTI's parcels. As clearly shown by the MAPS Master Plan design, and supported by the uncontroverted evidentiary affidavits of Messrs. Deal and Martin, TTI's parcels were not part of the public use that MAPS needed (as evidenced by Exhibit K to TTI's Motion to Reconsider). Not only did The City condemned the property under the false pretense of using it for public parking, it then transferred the very same property just a few days later to the OCURA who intended to use the Urban Renewal Act (i.e., clearing of a slum and blighted area) to sell it to a private developer in competition with TTI for a profit-making venture for that developer.

The City was without the power under its own ordinances to act in this manner since The City used MAPS funds in purchasing the land, using the disguise of necessity for MAPS projects, and when neither the MAPS Master Plan nor the MAPS Ordinance includes expenditures to support private development under any Urban Renewal plan.

Here, it is clear that The City told the Trial Court, in its Petition and throughout, that the TTI parcels are needed for MAPS project, and specifically for parking and public recreation, when, in truth and in fact, the TTI parcels were neither needed for nor included in the MAPS Master Plan. The only presumption that can be made is that The City always intended to use TTI parcels for private development or to trade for other property which does not involve MAPS. It needs to be clarified that MAPS are certain projects and MAPS is not synonymous with Bricktown development in Oklahoma City.

Clearly, The City deceived and misled the Trial Court by claiming MAPS usage when the usage was apparently for Bricktown development. The importance of this is that The City was without any legal authority to condemn for Bricktown development or to use MAPS law or MAPS money for non-MAPS projects.

In a hearing on public use versus private use claim, all presumptions are to be taken in favor or the condemnee. *Watkins v. Board of Commissioners of Stephens County,* 1918 OK --, 70 Okla. 305, 174 P. 523. Thus, the presumption here favors TTI and the condemnation orders should have been rescinded and the land returned to TTI as there is no plausible explanation other than a taking for private use. The Trial Court, faced with uncontroverted facts, then clearly erred in denying the motion to set aside as requested by TTI.

Even though proof of a reasonable necessity would only ordinarily be required, such a lessened standard is only in the absence of fraud, bad faith or abuse of discretion. *Luccock v. City of Norman,* 1978 OK 66, 578 P.2d 1204. Fraud and bad faith exist at bar, so more proof should have been required. Since, The City does not contest the facts recited in TTI's Motion which showed the fraud and bad faith, those claims should be deemed confessed and condemnation reversed. This Court is respectfully requested to reverse these erroneous decisions.

PROPOSITION V: TRIAL COURT ERRED IN REFUSING TO ADDRESS MERITS OF MOTION TO RECONSIDER ON NECESSITY AND PROPRIETY OF TAKING DESPITE CONDEMNEE'S RECEIPT OF AWARD WHERE AWARD WAS SOUGHT BY CO-DEFENDANT, APPLICATION WAS DRAFTED BY CONDEMNOR, AND CONDEMNOR DID NOT OBJECT TO CONDEMNEES RECEIPT OF AWARD.

TTI seeks reversal of the Trial Court's refusal to reconsider its prior rulings and denying TTI's Motion to Reconsider filed September 28, 1999, for the reason that appellee The City presented in oral argument an incorrect representation of law to the Trial Court and which apparently served as the basis for the Court's erroneous ruling. The City confessed all facts and aspects of TTI's September 28, 1999, Motion. Yet, in oral argument on the Motion held October 21, 1999, The City misled the Court in several respects. First, The City termed Defendant's Motion "frivolous" because, City claims, the award was paid out based upon the motion of the County Treasurer of Oklahoma County, and TTI's acceptance of that award, according to The City, bars a continued contest to the condemnation itself. Second, The City equated TTI's receipt of the money as "acceptance" which supposedly would bar reconsideration and any appeal at this late date.

TTI has always contested, and continues to contest, the alleged need claimed by The City; there has been no abandonment of that position. *See R. 14-17, 23-24, 91-94: Answer filed April 14, 1997; Exceptions to Report filed June 30, 1997; Defendant's Response filed August 22, 1997.* The parcels of TTI were never within MAPS nor apparently intended for anything to do with MAPS, an apparent fraud when The City pleads to a Court that MAPS is the basis, but never plans for those parcels under MAPS (and in light of the subsequent transfer to OCURA).

TTI **did not** ask for the award to be paid out, but merely received the award based upon the motion of the County Treasurer. *See Exhibits "A", "B", "C" and "D" to R. 484-493.* Also, the pleading requesting payment is believed to have been drafted by The City, although addressed as a motion by the County Treasurer. Letters from The City's lawyer and Mr. Tal, on behalf of TTI, confirm the withdrawal as being blessed by The City while not waiving any challenge of TTI. *See Exhibits "B" & "C" to R. 484-493.*

The Trial Court mistakenly decided that the condemnee's (TTI's) receipt of the award was fatal to the continued contest of the condemnation order. The case law in Oklahoma does not support such a ruling.

In *Grand River Dam Authority v. Eaton,* 1990 OK 133, 803 P.2d 705, receipt of a commissioner's award and payment of a judgment in a condemnation case was held not to foreclose the right to appeal as the payment of the money was not with intent to compromise or settle the matter. This corresponds to TTI's position that receipt of the commissioner's award does not prevent the continued contest as to the necessity of the taking since the receipt of that award was not at the request of the condemnee (TTI) nor ever intended to waive that contest. *See R. 484-493.*

In *Jerry Scott Drilling Co., Inc. v. Scott,* 1989 OK 131, 781 P.2d 826, this Oklahoma Supreme Court held that the condemnation order itself is not a final appealable order where there exists a timely demand for jury trial on value. This aligns with TTI's position in its Reply filed October 15, 1999. *R. 472-483.* Accordingly, the condemnation order was merely interlocutory (*see i.d.* para. 1 where the Court stated: "We have determined the order [which confirmed a report of appraisers] was interlocutory in nature rather than final . . . .").

Next, in *McMillian v. Holcomb,* 1995 OK 117, 907 P.2d 1034, the issue concerning a condemnee receiving the commissioner's award was discussed as it pertains to the effect of appealing the condemnation decision (not the value itself). The Trial Court was directed to paragraphs 14 through 17 of the *McMillian* decision where this Oklahoma Supreme Court decided that, so long as the condemnee did not ask for the money, i.e., make an application for payment of the money deposited, the condemnee's receipt of that money does not bar condemnee's contest of the decision to condemn. As this Court has stated, a condemnee should not be penalized when

condemnee did not make an application for payment. Receipt of the award means nothing as to condemnee's right to contest the condemnation.

TTI did not make an application for payment. The City desired the withdrawal, did not contest the pay out, and has not sought an order to require TTI to pay the amount disbursed back to the District Court Clerk. Thus, the receipt by TTI of the award from the Court Clerk is irrelevant and inconsequential. This is consistent with TTI's Motion and Reply filed in September and October with the Trial Court. It is also consistent with the statutory law on appeals from condemnation cases and those cases which hold decisions during the condemnation proceeding as interlocutory and not appealable. *See 66 O.S. § 56; Wrightsman v. Southwestern Natural Gas Co.*, 1935 OK 724, 173 Okla. 75, 46 P.2d 925; *Eufaula v. Ahrens*, 1916 OK —, 58 Okla. 180, 159 P. 328.

Since the Trial Court clearly erred in basing its decision on the award being paid out to TTI (a proposition the law shows to be wrong in contravention of The City's Response to the lower court), that decision should be reversed in the interest of justice and the Motion to Reconsider should have been heard on its merits, with the concessions of The City, and a decision made accordingly on the propositions stated therein.

The record reflects that, from the very beginning of this cause of action, TTI has continually and consistently challenged the legality and the necessity of the taking of its property by The City. Examples are as follows:

1. In its April 14, 1997 Answer, TTI has denied that the City needs the property for public parking, and further alleged that the taking by the City is unconstitutional and unnecessary. *See R. 14; Answer, page 1.*

2. In its June 30, 1997 *Exceptions To Report*, TTI again

challenged the legality and necessity of the taking insofar as the property was already dedicated to public parking by TTI. *See R. 23; Exception to Report*, page 1, ¶ 5. In this pleading, TTI also challenged the impropriety of The City's intent to transfer the property to the OCURA which issued a Request for Proposal for non-parking commercial development of the property.

3. In its August 22, 1997 *Response to Plaintiff's Motion to Overrule Defendant's Exceptions to Report of Commissioners, R. 91-94*, TTI again alleged and challenged the necessity of the taking as well as the legality of the taking and in support, citing the Oklahoma Supreme Court decision in the case of *City of Pryor Creek v. Public Service Co.*, 1975 OK 81, 536 P.2d 343.

4. In support of its Response, TTI filed, on August 28, 1997, the Affidavit of Moshe Tal, *R. 103-305*, which detailed the circumstances and supports TTI's position as to the fact that TTI, years before the condemnation filing by the City, had already dedicated its land for the same purpose in which the City is claiming the need here. BT 2000 in June of 1995, in September of 1995, and in July of 1997 submitted plans to The City, such being exemplified by the exhibit to Tal's August 28, 1997, Affidavit and as Exhibits E, F, G and J to TTI's Motion to Reconsider. *R. 103-305 & 350-455.*

5. In its October 1, 1997, *Response to Plaintiff's Motion for Rehearing, R. 327-328*, TTI again claimed that The City cannot condemn property for the same purpose for which it is already intended to be used by the present owner, citing Oklahoma Supreme Court's ruling in the *City of Pryor Creek* case.

This Court must consider the dates of crucial events which reveal The City's **true** intention for the land use. The Commissioners' Report was filed on June 12, 1997. Twelve (12) days later, on June 24, 1997, The City passed a Resolution to declare the entire area a Sport-Entertainment district (and supporting parking) and to transfer the land to OCURA for

private development.[4] The City deposited the Commissioners award on July 11, 1997 (2 weeks after the Resolution to transfer the land to OCURA for use as private development).

The Record shows that TTI has never waived, nor shown any desire to waive, its contest to the taking. Any decision predicated upon such is erroneous and should be reversed.

PROPOSITION VI: THE TRIAL COURT SHOULD HAVE ISSUED AN INJUNCTION TO PREVENT FURTHER ALIENATION OF THE PARCELS.

TTI asked the Trial Court, if it denied TTI's modification request, to then prevent further harm to TTI by enjoining The City and its agent, OCURA, from further transferring the parcels, especially to any third/fourth party. OCURA has yet, at this time to TTI's knowledge, complete the transfer to TMK/Hogan, thus the need for injunction still exists.

Injunction may be used as a provisional remedy. *12 O.S. § 1381.* When it appears that a party will act to render a final judgment concerning property ineffectual, then injunction is an appropriate remedy. *12 O.S. § 1382.*

Where an injunction is not entered, TTI feared The City or its agent, OCURA, may then try to alienate or transfer away the property so that all TTI could claim is damages for loss of the property if the decisions of this Court were reversed on appeal.

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[4] It should also be noted there that the Oklahoma City Charter and rules require the introduction of any new resolution no later than 2 weeks prior to voting on such resolution. Hence, the June 24, 1997 resolution would have been introduced the very SAME week that the Commissioners filed their report in this case (the week of June 12, 1997).

Injunctions have been used in various aspects of condemnation cases. *See e.g. Wright v. State ex rel. Department of Highways,* 1951 OK 119, 204 Okla. 380, 230 P.2d 462; *Watkins v. Board of Commissioners of Stephens County,* 1918 OK --, 70 Okla. 305, 174 P. 523.

Since land is unique, TTI has an inadequate remedy at law if the Trial Court's condemnation decisions do not survive appellate review. Therefore, the reasonable request by TTI urging the Trial Court to enter an Order enjoining The City and its agents from any further alienation or transferring the parcels was appropriate and should have been granted.

CONCLUSION

From the arguments made herein, it is apparent that The City failed to properly follow the required condemnation laws (by misstating its purpose and having no legitimate purpose under the procedure it utilized), misrepresented the purpose of the condemnation to the Court (its own development plans contradict its allegations kin this case), and possessed an ulterior motive for condemnation (not the 'public purpose' alleged but money-making development for a private developer). In contrast, appellant TAL TECHNOLOGIES, INC. has consistently contested the condemnation's alleged necessity, has presented evidence that necessity was non-existent from the outset, has shown that the parcels were taking for allegedly one purpose and immediately applied to another purpose involving a private developer/competitor of TTI's, and has shown that its rights under both federal and state constitutions are infringed by this eminent domain action. Any of these arguments should suffice, in and of themselves, to provide appropriate cause for the relief sought and requested by TTI; together they should be substantial enough proof to demand the relief for which TTI prays herein.

WHEREFORE, appellant TAL TECHNOLOGIES, INC. now

Publisher's Note:

Page(s) APPENDIX-III missing in original document

vs.	)	**Case No.: 94,045**
TAL TECHNOLOGIES, INC., an Oklahoma corporation,	)	
Defendant/Appellant,	)	
and	)	
BANK ONE, OKLAHOMA CITY, and FORREST "BUTCH" FREEMAN, as Treasurer of Oklahoma County, Oklahoma, and SHIRLEY DARRELL, EARL ROOMS, and STUART EARNEST, SR., as Board of County Commissioners of Oklahoma County, Oklahoma, and L.D. RHODES OIL CO., an Oklahoma corporation, and L.D. RHODES, an individual,	)	
Defendants.	)	

PETITION FOR REHEARING AND COMBINED BRIEF IN SUPPORT

COMES NOW Appellant TAL TECHNOLOGIES, INC. (TTI) and, with all due respect to this Court, petitions and files for rehearing of the decision of this Court entered on July 31, 2001, for the reasons set forth herein.

Succinctly, TTI notes that Appellee The City of Oklahoma City (City) has never contested the facts or allegations of fraud and misrepresentation raised by TTI in the Trial Court thereby confessing to those allegations as true facts and upon which this Court should not seek to deny, that TTI proceeded in 1999

under a renewed challenge or re-urging of grounds to deny the taking of TTI's parcels under eminent domain and not for review of any final judgment as one has not yet been entered in this case, and that other grounds for reversal were not addressed by this Court and as set forth in TTI's appellate brief. Therefore, and for these reasons as more fully addressed herein, this matter should be reheard, whereupon the decision of the Trial Court should be reversed as shown by Oklahoma law.

1. The City does not and has never disputed the operative allegations of TTI.

Despite numerous chances in the two Motions to reconsider and with its Reply Brief on Appeal, The City has never denied nor disagreed with those facts and allegations set forth by TTI which prove a fraud and misrepresentation of intent. By its silence, The City has confessed that it did not accurately represent the true basis and intent for condemnation to the Trial Court, that it acted in bad faith, and that it abused its eminent domain powers. As stated in Page 1 of TTI's BRIEF OF APPELLANT RESPONDING TO MOTION TO DISMISS, The City has furthermore agreed "that the pertinent facts surrounding this condemnation were not fully discoverable until well after the condemnation order."

TTI laid out precise and sequential facts in its BRIEF IN CHIEF, pages 3 - 7, which repeated the uncontested allegations from TTI's Motion to Reconsider. Within that chronology are the statements that The City did not commit to a purely private development until just recently (January of 1999 as noted in the Motion to Reconsider as the date of the public resolution). TTI further noted in its BRIEF IN CHIEF that in 1999 the private developer has committed to use the TTI parcels for its private money-making development, not public purposes. The City's appellate brief did not contest these statements, hence they are admitted as being true and accurate. Concessions and

admissions in appellate briefs can serve to supplement any deficient appellate record. *Oklahoma City Urban Renewal Authority v. Medical Technology & Research Authority of Oklahoma,* 2000 OK 23, ¶ 14 f.n. 24, 4 P.3d 677; *Deffenbaugh v. Hudson,* 1990 OK 37, 791 P.2d 84; *Reeves v. Agee,* 1989 OK 25, 769 P.2d 745.

The City's only real attack upon the Motions to Reconsider, and its main thrust in attacking this appeal, was based upon the collateral issue of the release of condemnation funds from the Court Clerk. This is evident from a review of The City's responsive briefs in the Trial Court plus its Motion to Dismiss and Reply Brief filed in this Court. TTI has shown that The City's suggestion, and the Trial Court's ruling on that basis, was simply incorrect under Oklahoma law and the true facts (since The City took liberties with the facts in order to arrive at its conclusion).

As The City apparently does not disagree that it acted inappropriately and improperly in this proceeding, then the determination of this Court should not be as to whether The City had a defense to TTI's claims, i.e. whether all necessary grounds were pled and proven, but should be beyond that step with those elements having been conceded as fact. The reconsideration of the taking in the court below never progressed to a review of the merits since the Trial Court did not rest its determination upon the grounds, but instead upon the procedural question of release of funds. Therefore, this Court's statements that TTI failed to meet its burdens of proof, Opinion at p. 7, fails itself to realize that TTI was never permitted to try its claims on the merits.

With all due respect, TTI's allegations of fraud and misrepresentation have been established since the defending real party in interest, The City, did not and has not contested either the allegations or the facts pled in the Trial Court or this appellate court. Therefore, since there is no dispute that The

City committed fraud and misrepresentation, TTI respectfully requests a rehearing upon the grounds and merits of this appeal as raised by TTI.

2. TTI's motions were an Oklahoma Supreme Court sanctioned renewal of the initial challenge and not appeal of any final judgment.

As one commentator has recently noted, ordinary rules of civil litigation are not necessarily followed in condemnation cases. Box and Blank, *Before the Bulldozer Comes: An Eminent Domain Guide for the Landowner*, 72 Okla. Bar J. 2365, 2366 (2001). A review of the statutory and case law in Oklahoma does not precisely state that an order for possession of the property (which is what has occurred thus far at bar) is a final judgment, or is an order that must be appealed at that precise point in time or be considered *res judicata*.

Under Oklahoma law, the final judgment is the final order which determines all of the rights of the parties. *12 O.S. § 681.* The determination of all issues results in this final, appealable judgment. *Eason Oil Co. v. Howard Engineering, Inc.,* 1988 OK 57, 755 P.2d 669.

Disposition of a portion of a case is an interlocutory adjudication and is subject to alteration or modification at any time by the trial court. *Mann v. State Farm Mutual Automobile Insurance Co.,* 1983 OK 84, 669 P.2d 768. For example, an order for delivery of property is not a final judgment where the court reserves decision on any issue. *Emerson v. Lewis,* 1954 OK 245, 274 P.2d 529. By way of contrast, a final judgment ends the case entirely and leaves nothing else for the court to do with regard to determining the rights of the parties. *Carroll v. State,* 1921 OK —, 80 Okla. 89, 194 P. 219.

In *Roach v. Jimmy D Enterprises, Ltd.,* 1996 OK 26, 912 P.2d 852, the Supreme Court held that an "interlocutory order is not

subject to appeal unless it falls within a class of interlocutory orders appealable as a matter of right or is certified for immediate review because it affects a substantial part of the merits of the controversy." (Citations omitted.) TTI's appeal here is an interlocutory order appealable as a matter of right. This Court's statement, in Page 4 of the decision, that an interlocutory order "must await a final disposition of all the issues" is incongruous with the holding in *Roach*. TTI views this appeal as one from an interlocutory order which it has the right to appeal.

Again, TTI is not appealing the Trial Court's orders from 1997. Instead, TTI is appealing from the refusal of the Trial Court to uphold the renewed challenge to the taking, based upon new evidence showing the illegality of the taking and utter lack of necessity.

TTI renewed its challenge to the condemnation order with its motions to reconsider. Since this case is ongoing, with no final judgment entered, these motions were not untimely. The Oklahoma Supreme Court, in *Gilliland v. Chronic Pain Associates,* 1995 OK 94, ¶ 7, 904 P.2d 73, expressly stated that "the landowner's initial challenge could be *renewed* before a condemnation decree (with a compensation award) is entered in the case." (Emphasis in original.) If the challenge were renewable, and note that the Supreme Court did not limit this to the Vacation of Judgments statute, then a challenging landowner cannot be limited to 12 O.S. § 1031 reasons alone for this renewed challenge.

There has been no condemnation decree with a compensation award entered in this case, hence TTI's challenge to the taking can be renewed. In accordance with 12 O.S. § 990A, TTI could wait until the final jury award, i.e., the final judgment, and then appeal the entire case including the necessity issue. However, in the interests of justice and to avoid an expensive and potentially unnecessary jury trial on the

valuation of the parcels, TTI brings this appeal at this time.

To deny TTI's appeal here based upon § 1031 considerations places this decision at odds with the *Gilliland* opinion and requires more of TTI than is required by law. As more fully set forth in the following proposition, TTI had no chance to uncover or discover the evidence of fraud and misrepresentation until 1999 — the important evidentiary proof did not become a matter of public record until January and September of 1999. TTI *renewed* its challenge before the Trial Court since there was no final judgment and since Oklahoma law does not forbid such (but even approves such a tactic under *Gilliland*).

This Court's reliance upon *McMillian v. Holcomb*, 1995 OK 117, 907 P.2d 1034, appears to miss crucial elements of that case. *McMillian* involved a condemnation where the monetary award was not being contested and where there was no objection to the Commissioner's Report. In short, there were no further issues for decision in *McMillian*. Instead, the focus of *McMillian* was whether the condemnation order, *where there was no contest to the award,* began the clock for purposes of appeal and motions to vacate as the final judgment in the case.

Incongruous with the facts in *McMillian* is the case at bar where there are issues yet to be decided, e.g. the monetary value of the property which The City seeks to take. Likewise, unlike *McMillian*, TTI did in fact file a timely Exception to Commissioners' Report and challenged the legality of taking within less than 30 days from the date of the Report. *See Record 23-24.* That is precisely why TTI has stated to this appellate court that it is not required to appeal or forever lose the issue, nor is it constrained by the Vacation of Judgments statutory limitations. There is harmony with *Gilliland* and *McMillian* where, as here, a renewed challenge to the taking is made during the pendency of the condemnation case and a landowner appeals from the denial of that renewed challenge

or where the landowner waits until all issues are decided and then appeal the entire case, including the challenge to the taking, within thirty days of the filing of that final judgment.

If this Court's present decision were allowed to stand, then this case would have two final judgments; one in 1997 and one in the future when the valuation issues are determined by a jury. Such a process is unclear from the case law, if that were indeed Oklahoma law, and should not then be applied to this case and trap an unwary litigant. Indeed, this Court's decision appears to deny a renewed challenge force a litigant into the statute concerning vacation of prior judgments.

Under *12 O.S., Ch. 15, App. 1, Rule 1.20(a)(15)* which states, in relevant part, that the "term judgment excludes interlocutory orders appealable pursuant to . . . 66 O.S.1991 § 56 (such as an order adjudicating a right to condemn — see Town of Ames v. Wybrandt, 203 Okla. 307, 220 P.2d 693, 696)." Yet, the term "judgment" does include appeals of condemnations under the provisions of *66 O.S. § 56. 12 O.S., Ch. 15, App. 1, Rule 1.20(a)(11).*

If the October, 1997, order is a final judgment from where appeal must have been made within 30 days or be forever barred, then such doctrine is not clear under Oklahoma law and should not be applied here to bar an unwitting party appellant.[5] Furthermore, then the *Gilliland* quote, *Id.*, 1995 OK 94, ¶ 7, which states that the condemnation challenge may be

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[1] For example, in *Blankenship v. Bone,* 1974 OK CIV APP 54, 530 P.2d 578, the Court of Civil Appeals allowed an appeal from a motion to vacate and reconsider filed well after 30 days from the possession order. *Blankenship,* however, was decided adversely to the appellant there who failed to timely object to the taking initially, unlike TTI here which did timely object.

"renewed" is vague and misleading as to its meaning or purpose.[6] The only renewal cognizable is one of the necessity of the taking during the pendency of the condemnation case, which is precisely what Appellant TTI is embarking upon here.

With all due respect, TTI requests this Court rehear this appeal and decide this case upon the merits as set forth within the Petition in Error and briefs filed herein since TTI undertook a renewed challenge to the taking as expressly authorized by the Oklahoma Supreme Court.

3. TTI did plead and present evidentiary proof of diligence in attempts to discover and inability to discover the fraud.

While this Court places much emphasis upon TTI's uncontroverted allegations that the parcels were never included in the MAPS project at the time of condemnation, in actuality the more important evidence, again uncontroverted, is that, after the 1997 Order, The City acted in blatant opposition to its MAPS claim by deeding the parcels to an agency with the intention of transferring them to a private developer in a for-profit venture that is unrelated to MAPS. The non-inclusion in MAPS merely reveals the intent from the start to use the MAPS excuse as a basis to take private property dedicated to public use for a private purpose under the disguise of a public purpose which, even if true, would not be legal under State law.

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[2] Additionally, TTI did not have and could not obtain some evidence which proves the illegality/misrepresentation of the taking until just recently. For example, the intended transfer to a private competitor of TTI for private, profit-making purposes was not revealed until some time well after the 1997 order (i.e., 1999).

Assuming that TTI is estopped from utilizing the non-inclusion of the parcels in MAPS plan evidence does not adversely affect the claims of TTI as to the illegality of the taking. It is not the silence of the MAPS plan, but the acts of The City in taking and using private property (dedicated for public purpose) and then using that same property in a for-profit private venture by a competing private developer that shows the condemnation as illegal and improper.

The Motion to Reconsider of September 28, 1999, in the Trial Court set forth chronological facts as to when matters were discovered which reflected that The City was never going to use TTI's parcels for MAPS or MAPS-related projects. In that Motion, the following uncontroverted and uncontested facts relevant to this issue were pled:

> 11. Within months of this Court's Order of condemnation, The City, by Resolution dated November 4, 1997 (Exhibit "L"), deeded property, including Parcel 8016 & 8019 to the ("OCURA"), an entity not associated with the MAPS project . . . .
>
> 12. On May 20, 1998 (almost one year after the original designation of OCURA), the OCURA and The City decided to cancel BT 2000's designation and gave the entire development rights to TMK/Hogan.
>
> * * * * *
>
> 14. It has recently come to light that the specific development plan of the developer, TMK/Hogan, which has been approved to develop land from the OCURA, including TTI's land, designated Parcels Nos. 8016 & 8019 as, not public parking, public recreation or park, . . . but rather for restaurant, retail shops and some parking to support those endeavors. *See City Resolution of January 12, 1999,*

adopting TMK/Hogan Development Plan and Drawings . . . .

16. TMK/Hogan has stated to the Oklahoma Supreme Court in a brief filed September 23, 1999, that the intention for the area of TTI's Parcels Nos. [sic] is planned for "retail, restaurant and entertainment venue" with parking now planned well North of the area. . . . .

17. It is now self-evident that TTI's parcels were never intended for MAPS, but that MAPS was used as an excuse to condemn the land which would then be transferred to a city agency and then sold to a private developer, who will then handsomely profit from developing the land while providing no public parking, public park or MAPS infrastructure.

MOTION OF DEFENDANT TAL TECHNOLOGIES, INC. TO RECONSIDER AND MODIFY ORDERS, etc., filed September 28, 1999, pages 7 - 8. (Emphasis on dates in para. 15 & 16 added.) Until The City and the new private developer of the parcels taken from TTI made matters of public record, there was no evidence to provide the Trial Court which substantiated that the parcels would not be later added to MAPS.

From the recitations in this Motion it is evident that the true plan could not be proven in the September-October of 1997 time frame (during the initial hearings on the legality of taking issue) and only after the matters became public record, and that not occurring until January 12, 1999, and September 23, 1999, when The City adopted the TMK/Hogan plan contradicting the condemnation purposes pled to the Trial Court and TMK/Hogan affirmed it had no intention of anything within the purposes pled by The City as a reason to take TTI's property. If this Court seeks further evidence of the date of discovery and inability to discover, evidence of which The City

has not demanded proof nor contested in this case, then TTI respectfully urges either an evidentiary hearing or return to the Trial Court for such. Since the evidence does exists and was pled, and more specific evidence is available on this point (although it has not heretofore been raised by either the opposing party or Trial Court), justice would seem to require a remand to the Trial Court for review of an issue that was never considered, in lieu of deciding based upon a record which this Court apparently deems inadequate. Until January and September of 1999, the true plans were never a matter of public record which could be discovered by TTI or its representatives.

In 1997, when the transfer orders were entered, the only facts known or knowable were those that had occurred, i.e., the lack of inclusion in the MAPS plan and the *apparent* intent to use the parcels for commercial, non-MAPS, purposes. *See* Exceptions to Report filed June 30, 1997, para. 4. Unknown and unknowable from the public record, was that TTI's speculations about The City never using TTI's parcels for MAPS were prophetic and accurate, evidences which did not become available until 1999. It was not until 1999 that the apparent intent could be proven. Prior to that 1999 time frame, The City's simple excuse was that the parcels 'would (in the near future) be included in MAPS.' Events occurring after the taking proved TTI's fears and insinuations to the Trial Court as accurate.

To deny TTI relief here encourages governmental entities to condemn for any statutory purpose they can plead, whether honest or not, and then wait a few years before actually using the property taken for illegitimate purposes without fear of recrimination. Such would permit a government to simply hide the truth and delay until after the taking, then thwart any contest with the claim that such should have been pled and proven (with non-existent evidence) prior to the taking order. The potential for abuse and corruption would be tremendous

and the protections for landowners who faithfully abide by the law would then be extremely limited, if not eliminated altogether.

In addition, there is no Oklahoma law which forbids landowner TTI, when utilizing a renewal of a condemnation challenge as sanctioned by, *inter alios*, *Gilliland*, to present new or different grounds, even if those grounds were existing at the time of the initial challenge to the taking. Thus, TTI cannot be deemed to have waived anything in 1997 as the challenge is being renewed, albeit under more certain grounds due to the availability of new evidence.

Upon this basis, that TTI did plead and provide proof and state that evidence of the fraud was not available, and did not become public record, until 1999, thereby satisfying all requirements under the Vacation of Judgments statute, and TTI would therefore urge a rehearing of this appeal.

4. Other appellate points raised by TTI but not specifically addressed.

TTI would reiterate and incorporate by reference all additional appellate points raised but not addressed specifically within this Court's decision, e.g., the public dedication issue and constitutional issues. Again, Oklahoma law allows renewed challenges to the taking, without time limitation since the case is still pending, and TTI falls within that permissive process. This Court's refusal to reverse based upon those additional bases for appeal is in direct opposition with Oklahoma case law and the State and Federal constitutions.

At the time of the taking, there was inadequate proof that The City was going to use the parcels taken for anything other than a public purpose, even though such taking then was illegal since it violated the prohibition concerning taking private land that was dedicated to the very same use as the government

intended. Since the transfer, however, it has become clear that The City took the land for transfer to a private developer for a private, for-profit, venture which is unconstitutional and wholly beyond the condemnation powers of The City, this having been fully addressed in Proposition II within TTI's Brief in Chief. Again, this plan does not become discoverable until records are made public showing the transfer and express intent.

TTI would respectfully urge this Court to rehear this matter for the reasons set forth herein and determine the appeal based upon the briefs and points on file. To deny such consideration permits a condemning authority to take property under a false claim of legal purpose and then, after a brief period of time, undertake what would have been an illegal purpose without fear of being stopped.

CONCLUSION

Appellant TTI has timely persisted in its objection to the taking of its property and renewed its objection during the pendency of this case as permitted by Oklahoma law, appealing the Trial Court's refusal to the renewed challenge. Evidence was not available in 1997, when the original orders were entered, and not until they became public record in 1999, which were pled in the pleadings with the Trial Court and this Court. As a renewal of a challenge to condemnation in a case which is still pending and which still contains undecided issues, i.e. no final judgment having been entered, TTI is timely and should not be hampered by the Vacation of Judgments statute's limitations. Yet, if the Vacations of Judgment statute does apply, TTI has still pled uncontested facts to come within that doctrine, and such was timely (i.e., TTI filed its motion for reconsideration on September 28, 1999, based on new evidence discovered on January 12 and September 23 of 1999 [only 5 days prior to the filing of the motion]).

For these reasons, rehearing of this case is proper and

should be undertaken by this Honorable Court. Upon rehearing, TTI as appellant would request reversal of the Trial Court's decisions appealed herein and remand to that Court.

In the alternative, if this Court wishes to decide this case upon alleged deficiencies in the evidence presented, then TTI would respectfully request and urge remand to permit TTI to provide such evidence as it does exist and was never contested by appellee The City nor deemed inadequate by the Trial Court. TTI respectfully requests permission to supplement this record with the proof which was never demanded in the lower court and never formed a basis for that court's decision; all in the interests of justice.

Respectfully submitted,

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15. *TTI's Petition for Writ of Certiorari, The City of Oklahoma City v. Tal Technologies, Inc, et al,* In the Supreme Court of the State of Oklahoma, case No. 94,045, filed 9/24/01.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY,)
a municipal corporation,)

Plaintiff/Appellee,	)	
vs.	)	Case No.: 94,045
TAL TECHNOLOGIES, INC., an Oklahoma corporation,	)	
Defendant/Appellant,	)	
and	)	
BANK ONE, OKLAHOMA CITY, and FORREST "BUTCH" FREEMAN, as Treasurer of Oklahoma County, Oklahoma, and SHIRLEY DARRELL, EARL ROOMS, and STUART EARNEST, SR., as Board of County Commissioners of Oklahoma County, Oklahoma, and L.D. RHODES OIL CO., an Oklahoma corporation, and L.D. RHODES, an individual,	)	
Defendants.	)	

PETITION FOR WRIT OF CERTIORARI

COMES NOW Appellant TAL TECHNOLOGIES, INC. (TTI) and petitions this Court for a writ of certiorari to the decision of the Oklahoma Court of Civil Appeals in this case.

Date of Decision by the Court of Civil Appeals: 07-31-01

Date of Order Denying Rehearing: 09-04-01

In this condemnation case, the Trial Court awarded TTI's

property to Appellee The City of Oklahoma City in an order, dated August 28, 1997, and modified October 2, 1997, leaving undetermined the property's condemnation value, which yet remains for jury trial. Following that time, evidence came into being in January of 1999 which substantiated TTI's position that The City misrepresented the true reason for its condemnation quest, taking TTI's land for the illegal purpose of transferring it to a competing private developer who would profit handsomely from his private development. This private development scheme was and is outside the scope of The City's condemnation powers, or its Council's underlying resolution. On September 28, 1999, TTI filed a motion to reconsider the taking order based upon this new evidence, renewing its challenge to the condemnation. The City has not denied TTI's claims or contested TTI's proof of The City's misrepresentation and fraud. The Trial Court denied TTI's motion on the basis that TTI was estopped from further challenge because the funds deposited into the Court via the Commissioners' Report had been paid out. The Trial Court denied a second motion to reconsider which specifically addressed its misapplication of Oklahoma law concerning removal of deposited funds. The Trial Court never addressed the merits of either reconsideration motion.

The Court of Civil Appeals erroneously held that TTI could not appeal the Trial Court's ruling because the motions sought review of an "unappealed, final order" that could not be reviewed. The Appeals Court decision was in error because it ignores case law from this Court's which permits a renewed challenge to the taking any time before a condemnation decree with award is entered. No condemnation decree has yet been entered in this case.

The Court of Civil Appeals then, looking at the vacation of judgments statute, 12 O.S. § 1031, erroneous determined that TTI has failed to provide sufficient proof of its inability to discover the fraud even though The City has never denied the

facts proving fraud, TTI's motion plainly stated that the evidence was not in existence until 1999, and the Trial Court never addressed that issue below. The Appeals Court thus acted as a fact-finder and reviewed a matter outside the scope of the appeal while denying TTI the opportunity to present its evidence.

Finally, the Court of Civil Appeals utterly ignored both State and Federal Constitutional arguments raised by TTI.

1. TTI's reconsideration motions in the Trial Court were sanctioned renewals of the initial challenge and not an appeal of any 1997 final judgment.

While the condemnation case is pending, TTI re-challenged, actually renewed its challenge, to the interlocutory order awarding the property to The City. Under Oklahoma law, the final judgment is the final order which determines all of the rights of the parties. *12 O.S. § 681.* Disposition of a portion of a case is an interlocutory adjudication and is subject to alteration or modification at any time by the trial court. *Mann v. State Farm Mutual Automobile Insurance Co.,* 1983 OK 84, 669 P.2d 768. An order for delivery of property is not a final judgment where the court reserves decision on any issue. *Emerson v. Lewis,* 1954 OK 245, 274 P.2d 529. By way of contrast, a final judgment ends the case entirely and leaves nothing else for the court to do with regard to determining the rights of the parties. *Carroll v. State,* 1921 OK —, 80 Okla. 89, 194 P. 219.

Despite this case law, the Court of Civil Appeals ruled that the 1997 orders were final orders from which TTI must have appealed or waived all right to contest. This decision is incongruous with the final judgment rules set forth by statute and this Court. TTI is not appealing the Trial Court's orders from 1997. Instead, TTI is appealing from the refusal of the

Trial Court to uphold the renewed challenge to the taking, based upon **new evidence** showing the illegality of the taking and utter lack of necessity.

TTI renewed its challenge to the condemnation order with its motions to reconsider. This Court, in *Gilliland v. Chronic Pain Associates,* 1995 OK 94, ¶ 7, 904 P.2d 73, has expressly stated that "the landowner's initial challenge could be *renewed* before a condemnation decree (with a compensation award) is entered in the case." (Emphasis in original.) If the challenge were renewable, then a challenging landowner cannot be limited to 12 O.S. § 1031 reasons alone for this renewed challenge since landowner if not seeking vacation of a final judgment.

To deny TTI's appeal here based upon § 1031 considerations places this decision at odds with the *Gilliland* opinion which references a "renewed" challenge. As more fully set forth in the following proposition, TTI had no chance to uncover or discover the evidence of fraud and misrepresentation until 1999 — the important evidentiary proof did not become a matter of public record until January and September of 1999. TTI *renewed* its challenge before the Trial Court since there was no final judgment and since Oklahoma law does not forbid such (but even approves such a tactic under *Gilliland*).

The Appeals Court's utter reliance upon language in *McMillian v. Holcomb*, 1995 OK 117, 907 P.2d 1034, ignores crucial elements of that case. *McMillian* involved a condemnation where the monetary award was not being contested and where there was no objection to the Commissioner's Report. In short, there were no further issues for decision in *McMillian*. Instead, the focus of *McMillian* was whether the condemnation order, *where there was no contest to the award,* began the clock for purposes of appeal and motions to vacate as the final judgment in the case.

Incongruous with the facts in *McMillian* is the case at bar where there are issues yet to be decided, e.g. the monetary value of the property which The City seeks to take. Unlike *McMillian*, TTI did in fact file a timely Exception to Commissioners' Report and challenged the legality of taking within less than 30 days from the date of the Report. *See Record 23-24.* There is harmony with *Gilliland* and *McMillian* where, as here, a renewed challenge to the taking is made during the pendency of the condemnation case and a landowner appeals from the denial of that renewed challenge or where the landowner waits until all issues are decided and then appeal the entire case, including the challenge to the taking, within thirty days of the filing of that final judgment.

If this decision were allowed to stand, then this case would have two final judgments; one in 1997 and one in the future when the valuation issues are determined by a jury. Such a process is unclear from the case law, if that were indeed Oklahoma law, and should not then be applied to this case and trap an unwary litigant.

With all due respect, TTI requests this Court to grant certiorari and decide this case upon the merits as set forth within the Petition in Error and briefs filed herein since TTI undertook a renewed challenge to the taking as expressly authorized by this Court. The decisions of the Court of Civil Appeals is at odds with the case law decisions from this Court.

2. TTI did plead and present evidentiary proof of diligence in attempts to discover and inability to discover the fraud.

The Court of Civil Appeals placed much emphasis upon TTI's uncontroverted allegations that the parcels were never included in the MAPS project at the time of condemnation, while, in actuality, the more important and uncontroverted evidence is that, **after** the 1997 Order, The City acted

inapposite to its condemnation case claim by deeding the parcels to an agency with the intention of transferring them to a private developer in a for-profit venture that is unrelated to MAPS. The non-inclusion in MAPS merely reveals the intent from the start to use the MAPS excuse as a basis to take private property dedicated to public use for a private purpose under the disguise of a public purpose which, even if true, would not be legal under State law.

The Motion to Reconsider of September 28, 1999, in the Trial Court set forth chronological facts as to when matters were discovered which reflected that The City was never going to use TTI's parcels for MAPS or MAPS-related projects. In that Motion, the following uncontroverted and uncontested facts relevant to this issue were pled:

> 11. Within months of this Court's Order of condemnation, The City, by Resolution dated November 4, 1997 (Exhibit "L"), deeded property, including Parcel 8016 & 8019 to the ("OCURA"), an entity not associated with the MAPS project . . . .
>
> 12. On May 20, 1998 (almost one year after the original designation of OCURA), the OCURA and The City decided to cancel BT 2000's designation and gave the entire development rights to TMK/Hogan.
>
> * * * * *
>
> 14. It has recently come to light that the specific development plan of the developer, TMK/Hogan, which has been approved to develop land from the OCURA, including TTI's land, designated Parcels Nos. 8016 & 8019 as, not public parking, public recreation or park, . . . but rather for restaurant, retail shops and some parking to support those endeavors. *See City Resolution of* ***January 12, 1999****, adopting TMK/Hogan*

Development Plan and Drawings . . . .

16. TMK/Hogan has stated to the Oklahoma Supreme Court in a brief filed **September 23, 1999**, that the intention for the area of TTI's Parcels Nos. [sic] is planned for "retail, restaurant and entertainment venue" with parking now planned well North of the area. . . . .

17. It is now self-evident that TTI's parcels were never intended for MAPS, but that MAPS was used as an excuse to condemn the land which would then be transferred to a city agency and then sold to a private developer, who will then handsomely profit from developing the land while providing no public parking, public park or MAPS infrastructure.

MOTION OF DEFENDANT TAL TECHNOLOGIES, INC. TO RECONSIDER AND MODIFY ORDERS, etc., filed September 28, 1999, pages 7 - 8. (Emphasis on dates in para. 15 & 16 added.) Until The City and the new private developer of the parcels taken from TTI made matters of public record, there was no evidence to provide the Trial Court which substantiated that the parcels would not later be added to MAPS.

From these recitations in TTI's Motion, it is evident that the true plan could not be proven in the September-October of 1997 time frame (during the initial hearings on the legality of taking issue), but only after the matters became public record; that recordation not occurring until January 12, 1999, and September 23, 1999, when The City adopted the TMK/Hogan plan contradicting the condemnation purposes pled to the Trial Court and TMK/Hogan affirmed it had no intention of anything within the purposes pled by The City as a reason to take TTI's property. If appellate courts seek to deny TTI's claims on inadequate evidence of the date of discovery and inability to discover, evidence of which The City has not demanded proof

nor contested in this case, then TTI respectfully urges either an evidentiary hearing or return to the Trial Court for such a hearing as fairness would dictate that the Trial Court be presented with the evidence first, and especially where the Trial Court ruled on procedural grounds, never reaching the merits of the motion. Since the evidence does exists and was pled, and more specific evidence is available on this point (although it has not heretofore been raised by either the opposing party or Trial Court), justice would seem to require a remand to the Trial Court for review of an issue that was never considered, in lieu of deciding based upon a record which this Court apparently deems inadequate. Until January and September of 1999, the true plans were never a matter of public record which could be discovered by TTI or its representatives.

In 1997, when the transfer orders were entered, the only facts known or knowable were those that had occurred, i.e., the omission of these parcels from the MAPS plan and the *apparent* intent to use the parcels for commercial, non-MAPS, purposes. *See* Exceptions to Report filed June 30, 1997, para. 4. Unknown and unknowable from the public record, was that TTI's speculation about The City never using TTI's parcels for MAPS was an accurate prediction. It was not until 1999 that the apparent intent could be proven because the evidence did not exist until 1999. Prior to that 1999 time frame, The City's simple excuse was that the parcels 'would (in the near future) be included in MAPS.'

There is no Oklahoma law which requires landowner TTI, when utilizing a renewal of a condemnation challenge as sanctioned by, *inter alios*, *Gilliland*, to present entirely new or different grounds. Nor does case law prohibit landowner from re-urging grounds previously raised during a renewed challenge, even if those grounds were existing at the time of the initial challenge to the taking. Thus, TTI cannot be deemed to have waived anything in 1997 as the challenge is being

renewed, albeit under more precise grounds due to the availability of new evidence.

Clearly, TTI did plead and provide proof and state that evidence of the fraud was not available, and did not become public record, until 1999, thereby satisfying all requirements under the Vacation of Judgments statute. The Court of Civil Appeals erred in failing to recognize this proof and deciding the issues as if it were a trier of fact.

3. Other appellate points raised by TTI and not specifically addressed.

The Court of Civil Appeals ignored other appellate issues raised by TTI, e.g., TTI's prior public dedication issue and the constitutional issues. Those issues were presented to and briefed in the Trial Court and are clearly part of the renewed challenge to the taking. The refusal to reverse based upon those additional appellate grounds is in direct opposition with Oklahoma case law and the State and Federal constitutions, more particularly U.S. Constitution Amendment 5 and Article 2, Section 24 of the Oklahoma Constitution (the taking of private property for non-public purposes).

At the time of the taking order in 1997, there was inadequate proof that The City would really use these parcels for anything other than a public purpose, even though such taking was illegal as taking private land dedicated to the very same use as the government alleged. Since the transfer, however, it has become clear that The City actually took the land in order to transfer it to a private, for-profit, development venture by a private developer. That purpose is unconstitutional and wholly beyond the condemnation powers of The City (this argument being fully addressed in Proposition II of TTI's appellate Brief in Chief). The profits to be realized from the private development versus the small amount deposited pursuant to the Commissioners' Report is staggering.

Again, this plan was hidden from the courts and did not become discoverable until records were made public in 1999, and showing the transfer and express intent. The City obviously did not wish to plead its true intentions because it was well aware that such an enterprise would be hotly contested and would not pass legal muster as a valid 'public purpose' justifying the use of the extraordinary powers of eminent domain.

Both State and Federal Constitutional law, as cited above, forbid the taking of private property via condemnation for the benefit of another private person. These constitutions do not permit The City to act as a real estate trader, profiting from the condemnation by selling it to another private person for a profit.[7] The constitutional arguments were raised in the Trial Court and the Court of Civil Appeals; neither addressed the merits of these arguments, each instead opting to rule on different procedural grounds.

TTI would respectfully urge this Court to hear this matter for the reasons set forth herein and determine the appeal based upon the briefs and points on file. To deny such consideration permits a condemning authority to take property under a false claim of legal purpose and then, after a brief period of time, undertake what would have been an illegal purpose without fear of being stopped.

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[7] The City here stands to make approximately 200% profit (60,000 square feet acquired at 89 cents per square foot and sold at $2.75 per square foot) by taking the land from TTI and then reselling it to a different private developer. That new developer would also profit from his development near Bricktown and increased land value, while TTI suffers by having only received a token payment under condemnation laws.

CONCLUSION

Appellant TTI has timely persisted in its objection to the taking of its property and renewed its objection during the pendency of this case as permitted by Oklahoma law, appealing the Trial Court's refusal to the renewed challenge. Evidence was not available in 1997, when the original orders were entered, and not until they became public record in 1999, which were pled in the pleadings with the Trial Court and this Court. As a renewal of a challenge to condemnation in a case which is still pending and which still contains undecided issues, i.e., no final judgment (condemnation decree) having been entered, TTI's challenge to the taking is timely, and should not be governed by any judgment vacation basis. Yet, even if the judgment vacation statute does apply, TTI has still pled uncontested facts to come within that doctrine, and such was timely (i.e., TTI filed its motion for reconsideration on September 28, 1999, based on new evidence discovered on January 12 and September 23 of 1999 [only 5 days prior to the filing of the motion]).

Constitutional arguments have been raised, but heretofore ignored. These constitutional arguments raise the legality of the taking as being violative of both the State and the Federal Constitution. This basis is timely as this case is still pending in the Trial Court.

For these reasons, certiorari to this errant decision is proper and should be undertaken by this Honorable Court. Upon consideration, Appellant TTI would request reversal of the Trial Court's decisions appealed herein and remand to that Court.

In the alternative, if the decision would be based upon alleged deficiencies in the evidence presented, bases which the Trial Court did not examine, then TTI would respectfully request and urge remand to permit TTI to provide such evidence as it does exist and was never contested by appellee

The City nor deemed inadequate by the Trial Court. TTI respectfully requests permission to supplement this record with the proof which was never demanded in the lower court and never formed a basis for that court's decision; all in the interests of justice.

Respectfully submitted,

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[FILED 9/24/01. Certificate of Mailing omitted]

END OF APPENDIX

Dated: February 1, 2002.

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